

No. 40.

By. of Ford for App.

Office Supreme Court
FILED
SEP 28 1901
W. MCKENNEY,
Clerk.

Filed Sept. 28, 1901.
Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 40.

SANTIAGO AINSA, ADMINISTRATOR OF THE ESTATE OF
FRANK ELY, DECEASED, AND EDWARD CAMOU, AP-
PELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

**STATEMENT OF THE CASE, SPECIFICATION OF
ERRORS, POINTS AND AUTHORITIES, AND
ARGUMENT.**

ROCHESTER FORD,
Attorney for Claimants.



Supreme Court of the United States

OCTOBER TERM, 1901.

No. 40.

SANTIAGO AINSA, ADMINISTRATOR OF THE ESTATE OF
FRANK ELY, DECEASED, AND EDWARD CAMOU, AP-
PELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

Statement of the Case, Specification of Errors, Points and Authorities, and Argument.

STATEMENT OF THE CASE.

This suit was instituted by the filing of petition of plaintiff Ainsa (Rec., pp. 1-6), which stated that petitioner was the owner of the certain land grant known as the "Agua Prieta," situated partly in Cochise county, Arizona, and partly in the Mexican State of Sonora. The petition represented that said grant was executed on behalf of the Mexican Republic on December 28, 1836, under the laws of the

Mexican Congress of August 4, 1824, and of the Congress of the State of Sonora of May 20, 1825, and July 2, 1834, and that said land was sold in fee to Juan, Rafael, and Ygnacio Elias Gonzales, the grantees, for a moneyed consideration of \$142.50, which was paid at the time.

The facts attending the making of the grant are set out in the petition as follows (pp. 2-4): Said citizens by petition of July 21, 1831, addressed to the honorable Treasurer General of the State of Sonora, applied for the public lands within the places and springs of Santa Barbara, Neidenibacachi, Agua Prieta, and Coabuyona, bounded on the north by the Chiricahua mountains, on the south by the lands of the Sinaloas, on the east by the mountains of Coaguiyona, and on the west by the land of Ians. Commission was forthwith given to the citizen Joaquin Vicente Elias, a resident of San Ygnacio, to survey the said public lands and effect the measurement and appraisement of same in conformity with law, which commission was ordered and signed by the said Treasurer General of the State. The foregoing commission was, on account of the inroads of the Indians, suspended until August 20, 1835, at which date the adjacent owners were summoned, and officials, surveyors, accountants, and markers were appointed as required by law, and the survey was made as follows:

"Taking as a center a lagoon or pool that is in the middle of the valley called Agua Prieta, the southern direction was taken by measuring and counting 59 cords, which ended at a clump of willow trees, which are situated in the middle of the valley, which were to serve as a landmark until the parties erected monuments of masonry, as provided by law. Returning to the center, the direction of the north was taken, and, going up the valley, there were measured 100 cords which ended on a very small hill, fronting towards the east with the pass called 'La Silla,' which was to serve as a landmark, and at which place a heap of stones was placed and a cross for a monument. Returning to the center, the direction of the east was taken, and towards it were measured and counted 168 cords, which ended on a high

hill, which is found on the right of the pass through which passes the old road from Santa Cruz to San Bernardino, which high hill was taken as a landmark, and at which place a heap of stones was placed and a cross for a monument. Returning to the center, the direction of the west was taken, and towards it were measured and counted 240 cords, which ended a little beyond where the little mountains seen in the said direction subside or end, on a long, sloping red hill that has a ledge towards the south, and fronting in the same direction with the highest point of the San José mountain, which hill was taken as a landmark and at which place a heap of stones was placed and a cross as a monument. Returning to the northern monument, there were measured and counted towards the east 168 cords, which ended near the Silla pass on a small hill that is to the right and near two larger ones, which small hill was taken as a landmark and at which place a heap of stones was placed and a cross as a monument. Returning to the northern monument, there were measured and counted towards the west 240 cords, which ended on a small hill in front of the cross monument in said direction, which hill was taken as a landmark, and at which place a heap of stones was placed and a cross for a monument. From this place there were measured and counted towards the south 89 cords, which ended on the cross monument of the west, and continuing in the said southern direction there were measured 60 cords, which ended at the foot of a high hill fronting towards the south with another hill that has a black crest and towards the east with a pass which has to the left two hills formed by red ledges, the foot of which high hill was taken as a landmark and at which place a heap of stones was placed and a cross for a monument. From this place there were measured and counted toward the east 240 rods, which ended at the cross monument of the south in the clump of willow trees spoken of before. From this place there were calculated 178 cords towards the east to the slopes of the first pass which is to the right of the point where ended the cross monument of the same direction, both points lying in a straight line along the foot of the Perrillo mountains. From this place there were calculated 59 cords toward the north, which ended at the cross monument of the east, and the survey was thus concluded of the said lands of Agua Prieta, resulting in 6 short sitios.

"There were further measured in favor of said petitioners and citizens Juan, Rafael and Ygnacio Elias Gonzales 11½ sitios and 12½ caballerios, composing the lands of Santa Barbara and Neidenibacachi, the survey, measurements and other proceedings regarding which are fully set out in the same said grant and title papers; all of which lands embraced within the further measurements, are, as your petitioner is informed and believes, located in the State of Sonora, Republic of Mexico.

"The 6½ sitios, composing the survey of Agua Prieta were thereupon appraised, one at \$60, as it has a small spring, and the remaining 5½ at the rate of \$15 each as they are absolutely dry; and the 11½ sitios and 12½ caballerios, composing the lands of Santa Barbara and Neidenibacachi, were appraised, one at \$80, another at \$60, and the rest at \$15 each, which sums make a total of \$432.50, and at such appraisement all of said lands were put up for sale for thirty consecutive days from June 4 up to July 4, 1836, but there were no bidders."

After final offer of sale and the sale and payment of the purchase price, the proper certificate, signed by the Treasurer General, in proof of the said payment, was thereupon joined to the expediente, and the said lands as measured and surveyed were, in due form of law, granted, given, adjudicated, and sold and conveyed by a complete and perfect title in fee to the said citizens, Juan, Rafael, and Ygnacio Elias Gonzales, and their heirs and successors, and the said title was thereupon recorded, in compliance with law, in the archives of the Treasurer General at Arispe, in the State of Sonora, on page 41 and the other side of it, of the Book of Toma de Razon for the year 1836.

It was further alleged that the title papers are genuine, that the original expediente is found in its proper place in the archives, and that said grant was recorded in Pima county, Arizona, April 25, 1867.

The answer of the Government averred that the State of Sonora and the officers by whom the grant was issued had

no authority to do so, and that the grant was null and void on that account.

There were also the following averments in the answer:

"Further answering, the United States says that the claim that said grant or any portion thereof is located within the jurisdiction of the United States is untrue, but, on the contrary, the said claim is located within the Republic of Mexico and is therefore not entitled to confirmation for the reason that the *situs* does not fall within the territorial jurisdiction of the United States or of this court as defined by law.

"Further answering, that under provisions of the laws of the Republic of Mexico, in the year —, Camou Brothers presented a claim to the national government of the Republic of Mexico for a confirmation of this grant, and that under and by virtue of an application of said national government said claim was investigated and surveyed according to the calls and description contained in the alleged grant of December 28, 1836, to Ygnacio, Rafael and Juan Elias Gonzales of what is known as the Agua Prieta grant, and that the same was surveyed and lies wholly south of the international boundary line within the Republic of Mexico.

"That under said application, said national government in the year 1882 confirmed the same and sold the demasias thereto, leaving a large area still existing between the north boundary of said grant and the demasias and the international boundary line, which said public lands have since been purchased from the national government by said Camou Brothers.

"That said Camou Brothers now claim and own the whole and all of the lands so granted by the alleged grant of December 28, 1836, and have received from the Republic of Mexico good and sufficient conveyances for the same and wholly lying within the said republic."

By leave of court the petitioners filed the following amended and supplemental petition:

"Comes now Santiago Ainsa, trustee and administrator, etc., petitioner herein, and, by leave of court first had and obtained, files a corrected map made [by] Ygnacio Bonillas, Esq., of the claim herein and also files this his amendment and supplement to his petition, heretofore filed, praying for

the confirmation of the Agua Prieta grant, and petitioner avers that prior to the treaty known as the Gadsden treaty, no resurvey of said grant had ever been applied for or ordered by any one, and that neither the grantees, nor their successors in interest, had, prior to said treaty, any knowledge or notice that within the said monuments there was any excess of land over the areas stated in said title papers, and petitioner avers that the grantees under said grant were under the laws of Mexico and the State of Sonora existing at the date of said treaty, and for a long time prior thereto had been, holders in good faith of any such excess or surplus, if any such there is, and entitled to occupy and retain the same as owners, even after such overplus is shown, without other obligation than to pay for the excess according to the quality of the land and the price that governed when it was surveyed and appraised; and petitioner further avers that if this honorable court should decide that said sale as recited in said title papers did not, as petitioner avers it did, convey to the grantees therein all of the said tract of land to the monuments described in said title papers without further payments therefor, he is ready and willing and now offers to pay to the United States of America any amount that may be found to be due from him for such overplus, and also the costs for ascertaining the same, as soon as the amount of the same and the sum due therefor is ascertained.

"Wherefore petitioner now tenders to the United States of America and offers to deposit with the clerk of this honorable court for the United States of America the sum of \$600 in gold coin of the United States of America as payment for all such overplus or surplus of all such lands in said grant, according to their quality and the price which governed when they were surveyed and appraised, and the further sum of \$200, in like gold coin, for the costs of ascertaining and determining the existence or non-existence of such surplus, and prays that this court order the clerk of said court to accept said sum as such tender, and, as aforesaid, offers to pay said amount, or any amount which may by this honorable court be adjudged to be due for such overplus or surplus, and prays that upon said payment this honorable court decree that petitioner is entitled to and is the owner of all of said tract of land as originally surveyed, including said overplus or surplus, and that by said decree he

be secured in the possession and ownership of the whole of said tract, and petitioner prays that the validity of his said title may be inquired into and decided, and that his title to all of said lands be declared valid, and that the said grant be adjudged to be and always to have been a complete and perfect and unconditional title in fee, and that petitioner be adjudged to be the owner in fee thereof, and for such other and further relief as to the court may seem meet and proper in the premises."

At the trial a duly certified copy of the expediente was offered in evidence (p. 26). It was proved that the original *titulo* or *testimonio* was in the possession of Juan Pedro Camou and was in Guaymas, Mexico, and that Mr. Camou refused to produce it. A duly certified copy from the recorder of deeds of Pima county, Arizona, of this original title paper was offered and also a translation of same (p. 27), and deeds showing plaintiff's deraignment of title.

The United States offered the *testimonio* of the denouncement of the tract of land situate in the district of Hermosillo and known as Agua Prieta, etc. (pp. 212-240); also certified copy of the proceedings of denouncement of a tract of land adjudicated to one Rodriguez and others (p. 254), and the map attached to said expediente and forming a part thereof. There were also introduced the title papers in certain other grant cases, and certain deeds and declarations.

Evidence as to the location of the grant was offered by plaintiff, and opposing evidence by the United States. The controversy was chiefly as to the location of the monument at the northeast corner. Plaintiff introduced evidence that this corner is some miles north of the international boundary line, as shown on the map facing page 24, while the Government attempted to show that the northeast corner is south of the present international boundary line, and that therefore the grant, as originally located, lies south of the international boundary line.

The Government endeavored to show that what the claim-

ant took as the east center monument is in reality the north-east corner, and that the east center lies in a pass called Misa, between such monument and the southeast corner.

The grant was rejected on the ground that it was a sale by quantity, falling within the rule laid down by the Supreme Court of the United States in the cases of *Ainsa vs. U. S.*, 161 U. S., 208; *Ely's Adm'r vs. U. S.*, 171 U. S., 220, and other cases. The lower court held that "the evidence shows that the 6½ sitios constituting the cabida legal, which is the quantity covered by the title, lies south of the international boundary line in the State of Sonora, Mexico."

Claimants were allowed an appeal and duly prosecuted same to this court.

SPECIFICATION OF ERRORS.

1

The court erred in holding that this grant was one of a certain quantity and not one of a specific tract, and erred in holding that any proceedings in Mexico after the treaty could affect rights to lands in the United States at the time of the treaty.

11

The court erred in refusing, even if the grant were one of quantity, to permit appellants to purchase the excess lands or demasias on their tender to pay therefor.

AUTHORITIES.

1

Mexican grants in California were of three kinds: 1, grants by specific boundaries, where the donee is entitled to the entire tract, whether it be more or less; 2, grants of

quantity, as of one or more leagues within a larger tract, described by what are called outside boundaries, where the donee is entitled to the quantity specified, and no more; 3, grants of a certain place or ranch by name, where the donee is entitled to the whole tract according to the boundaries given, or, if not given, according to its extent as shown by previous possession.

U. S. *vs.* McLaughlin, 127 U. S., 428.

Higuera *vs.* U. S., 72 U. S., 827, 834.

II.

But grants made in Sonora were not floats or a quantity of land to be afterwards surveyed and located, but were sales of the specific tract which had been identified by the survey and appraisement. In these cases the issuance of the title was the final act of the Mexican government and was the investiture of a complete title to the specified tract, with no future act to be performed.

III.

The grant of a tract with specified boundaries covers all the land within those boundaries, irrespective of quantity, and this is true although there is a statement that the tract contained a certain amount, which amount is very much less than that included within the boundaries.

U. S. *vs.* Hancock, 133 U. S., 193.

Maxwell Land Grant case, 121 U. S., 325, 369, 373.

IV.

Under the civil law a sale is always considered *per aver-sionem* when it is for a total sum and assigns to the land sold existing visible boundaries, such as rivers, highways, fences, pieces of iron, stone, or wood, showing the starting point and the direction of the dividing line with the adjoining

tenements. These sales are held to be *per aversionem* on the presumption that the parties to them have their attention fixed rather upon the boundaries than the enumeration of quantity.

Voice *vs.* Cage, 7 La. An., 672.

If in the sale of an immovable property the lines have been designated, the vendor would be obliged to deliver all that is comprehended within them, although there may be an excess in the measure expressed in the contract.

Hall's Mexican Law, sec. 2109.

When the sale is made of the whole of a certain quantity, by so much per pound, the bushel, or other measure, and the vendor expresses the number of them, he is bound to deliver to the vendee the whole, though it exceed the quantity, and the vendee is bound to receive the whole, though it fall short of the quantity specified.

Schmidt's Civil Law of Spain and Mexico, art. 612,
p. 134.

V.

Where, in Sonora, questions of excess arose in grants due to inaccurate measurements or computations, the remedy was by a further payment by the grantee, and not by a curtailment of the land surveyed.

Law of Sonora, May 12, 1835, cited in Ainsa *vs.* U.S., 161 U. S., 208.

VI.

The calls of the grant show that a portion now lies within the Territory of Arizona.

See title papers and evidence set out in the argument on this point.

VII.

No proceedings in Mexico subsequent to the treaty can affect rights in the United States fixed at the date of the treaty. The rights asserted by the inhabitants of the ceded territory depend upon the concession made by the officers of the Government having at the time the requisite authority to alienate the public domain, and not upon any subsequent declarations or actions of Mexican officials.

U. S. vs. Yorba, 1 Wall., 412, 423.

ARGUMENT.**I, II, AND III.**

The first question in the order of importance in this case seems to be, What land did the parties intend to buy and the Mexican government to sell? Is this grant one where a specific tract was applied for and sold, and therefore different from cases where the petition itself asked for only a certain quantity of land? We submit that this grant is essentially different from the ones which have been passed on by this court, because it was based on a petition for, and was a sale of, a tract by "specific boundaries, where the purchaser is entitled to the entire tract, whether it be more or less, and is a grant of a certain place or ranch by name, where the donee or purchaser is entitled to the whole tract according to the boundaries named."

What land did the petitioners petition for? Was it for certain tracts, not specifying any quantity, or was it for a named quantity? This is plainly answered by the language of the petition itself, which shows (Rec., pp. 116 and 361) that—

"Petitioners made legal petition for the lands that may be found to be public places within the places and springs aforesaid, which are bounded on the north by the Chiricahua

mountains, on the south by the lands of the Sinaloas, on the east by the mountains of Coaguiyona, and on the west by the lands of Ians."

It is absolutely impossible to construe this as a petition for anything else than the lands—that is, all the lands—within the named boundaries. No mention is made of any quantity.

In fact, the physical condition as disclosed by the recitals of the petition shows that the parties had in mind all the lands within the boundaries named. The statement is that the cattle of the petitioners wander towards the waters of the Agua Prieta, etc., "by which they suffer incalculable damages, because, as they are public lands, everybody who wishes enters freely into them, from which follow insults, robberies, and the scattering of the cattle more and more," etc.

The petitioners evidently wished to acquire all these lands as their own, so that they might have the exclusive use and possession of all the lands for themselves. If they had purchased only part of these lands, leaving the remainder public lands, it seems apparent that they would be no better off than before, because to the extent that any public lands were left, other persons could enter as freely as before, and the robberies and scattering of the cattle would continue.

How did the Mexican authorities understand this petition at the time? Certainly the construction which the Promotor Fiscal, or Attorney General, and other officials put on the petition at the time is entitled to the utmost consideration. The presumption is "very strong, if not irresistible," that this legal adviser and the other officers correctly understood the application. The Promotor Fiscal reported (p. 366) that the application of the citizens was that they "should have adjudicated to them the public lands to be found at the places called Santa Barbara, etc." Is there anything here that can be construed as showing that the application was

for a limited or designated quantity out of these lands and not for "the public lands," which of course means all the public lands?

Again: After the proceedings were finished and the formal title was issued and the usual preamble affixed reciting what had been done, we find that the Treasurer General stated (p. 360) that the citizens appeared on July 21, 1831, "with a written application registering the waters and lands of Santa Barbara," etc.

It is absolutely beyond any doubt that the parties desired all these lands, and that they made application for all of them, their very purpose being to have the exclusive possession of these lands. It is therefore submitted that the proceedings thus far show that the sale of the entire tract was contemplated, and that the sale of a smaller quantity within such tract was wholly contrary to their plan and purposes.

The lower court in its opinion says that—

"It is true that no specific quantity of land was asked for in the petition, and it is also true that the laws then in force authorized the Treasurer General to grant to them any quantity of land which the proof might show they needed for their cattle and horses, but it is also true that under the provisions of law the vacant lands could only be disposed of by sales to the highest bidder."

It will be shown that evidence was introduced as to whether the purchasers needed the whole or only part of the tract, and a decision rendered that they needed the whole thereof.

It is for the foregoing reason most respectfully urged that this case does not fall within the rulings of the cases above cited, because those cases were based on the holding that the petitions therein were for a quantity of land, while this petition is radically different. In the Nogales case, 161 U. S., 208, this court said, at page 224:

"It is to be noted that the petition does not appear in the expediente * * * but the most that can be claimed is that the petition was for 7½ sitios."

In *Ely, adm'r, vs. U. S.*, 171 U. S., 220, this court said, at page 225:

"The petition therefore was not for any tract known by a given name, but for a certain amount of land in such place."

The application here was, as we have above shown, for the whole of a tract known by a given name, and not for a certain amount of land in such place, and we invite a consideration of the further proceedings as showing that the whole of this tract was surveyed, appraised, and sold.

The petition further prayed the treasurer general to "admit the denouncement we make of said lands and to issue the corresponding order for the survey, appraisement, publications, sale and other proceedings necessary to be executed thereon" (p. 361).

The attention of the court is invited to the order which the Treasurer General made for a judicial hearing (p. 118), and to the testimony of the witnesses at that hearing (pp. 119-121). One of the points to be determined was whether the interested parties "have need of all or part of the unappropriated public lands and watering places which they denounce at Santa Barbara," etc.

Here attention was specifically directed to the very question whether all or part of the lands should be granted, and after the testimony of the witness is that the petitioners had the requisite number of cattle, and that they needed the places which they had named, the second alcalde reported that "in order to proceed with the issuing of the grant to the places Agua Prieta," etc., the proceedings were returned to the Treasurer General.

That official then made an order for the survey, reciting that (p. 361):

"Inasmuch as the foregoing report legally and sufficiently proves that these citizens have a considerable number of live stock for which are not sufficient the *sitios* they own," etc., "and inasmuch as for this reason the public lands they have denounced, called *Santa Barbara*, etc., are absolutely necessary to them, the surveyor will proceed to the survey of said lands and he will make the survey, appraisement, publications, etc., and summon the parties to appear at the sale of said lands."

This cannot be taken as anything else than a decision that all the lands were to be sold after a survey and appraisement. Whether the parties had need of all or only part of such lands had been inquired into and determined and no restriction or limitation was suggested. It is thus indisputable, it would seem, that the intention of the Mexican government was to carry out the wishes of the applicants and to survey and sell all the public lands at the places named.

The surveyor reports that he had received the foregoing commission "for the survey of the lands which the citizens have registered in the places known by the names *Santa Barbara*," etc.

The foregoing comprise the various proceedings up to the actual survey, and in none of these proceedings has any quantity been mentioned. There is nothing to show that any one had any idea how much land was contained within the boundaries of these places. That could be determined only by a survey, and as, under the law, lands had to be sold at public sale after an appraisement, it is evident that the object of the survey was to determine how much land there was in the tracts, so that the value of the tract, according to its quality, could be appraised according to law.

The survey was made, and the proceedings as to the lands at the place of *Aqua Prieta* (which is the only part of the grant involved in this case) conclude as follows:

"The survey being in this manner concluded and containing in its area, the calculation having been made with absolute correctness, 6½ short *sitios*."

As a matter of fact, however, the calculations were made with far from absolute correctness. Some of the distances were measured and others estimated, and both measurements and estimates were erroneous. A correct survey shows that the tract contains more than 6½ *sitios*.

Next followed the appraisement, and we invite the attention of the court to the language of the title paper, which is that the appraisement was of "the whole of the surveyed land." The Spanish is (p. 108, 15th and 16th lines from the top), "a efecto de que se justifacie el terreno todo mensurado." The very object of the survey was, as above stated, to ascertain the contents of the tract so that it could be appraised and sold. The appraisers could not know the contents without a survey, nor could they appraise an undesignated and unsurveyed quantity within the boundaries. The land, as surveyed, was appraised on the theory—for no one knew aught to the contrary—that it had been correctly surveyed, and it was sold on the same theory. What was appraised and sold was what had been surveyed, viz., the whole tract.

If there was a certain tract identified by designated boundaries and applicants desired to purchase all of such tract, what would or could have been done more than was done in this case? The tract had a value depending upon its quantity, and also upon its quality as to water. To ascertain the quantity and quality and thus fix the price, a survey and appraisement were made and the area was thus computed and the sale made. It turns out in this, as it has done in every other case, that the original survey was inaccurate. In view of the limited skill of the surveyors at the time, this could not have been otherwise. Regarding the inaccuracy of Mexican surveys, this court said in U. S. *vs.* Billings, 2 Wall., 444, at page 447: "Perhaps the province

of California at that time (1839) could not furnish a man capable of making an accurate survey." And this was doubtless just as true of the province of Sonora in 1836; and the court said in *Noe vs. U. S.*, 1 Hoff. Land Cases, 162, 169, referring to an estimate of the contents of a tract of land: "This is perhaps as close an approximation to the real quantity as often occurred under the loose and inaccurate ideas of the extent of land formed by the former inhabitants of this country." It is notorious that the quantity of land within the natural boundaries of Mexican grants often far exceeded the estimate of the surveyor, but this circumstance could not restrict the language of the grant or change the boundaries or the intention of the parties (*White vs. Burnley*, 20 How., 247).

Suppose, as above suggested, that a citizen desired to purchase a specific tract from the government of Mexico, and that government said, in effect, "We will sell you the tract for so much a sitio, depending on the quality," and proceeded to make a survey, and to sell and convey on the basis of such survey. The survey is afterwards found to be inaccurate. Does this fact in any respect change the intention of the parties? It cannot be seriously urged that it does, because if this were true, then it could not have been in the power of the Mexican government to sell and convey title to the whole of any given tract, for the reason that it was not in her power to survey the tract accurately.

This sale was not the conveyance of a right to select $6\frac{1}{2}$ sitios thereafter to be identified and located within the boundaries given. The proceedings were complete in themselves, and attempted to and did convey title to the specified tract according to the calls of the survey.

As to the construction and effect of sales similar to this, we believe it will be of interest and value to present the views of Justice Sluss, of the Court of Private Land Claims, as set out in his opinion in the case of *The Aravaca Land and Cattle Company, appellant, vs. The United States*, now be-

fore this court on appeal, bearing in mind that the present case, as we urge, differs from others in that the application was for a specific tract. Many of these Sonora grants have come before the lower court, and the views of Judge Sluss give the result of his study of the grants and the laws pertaining thereto. We quote from his opinion (pp. 74 *et seq.* in above-entitled cause, No. 153, October term, 1901) as follows:

“First, as to the question of location:

“I take it that a grant has been located within the meaning of the provision of the treaty in question when it affects to convey a particular tract of land capable of identification to a reasonable certainty.

“Now, giving this *titulo* the most narrow construction possible, it plainly purposed to convey a tract of two *sitios* at a certain place, with a recital that the tract so conveyed is identified by boundaries which are evidenced by certain specified objects. By any fair construction, it purports on its face to convey the whole of the tract within these boundaries.

“It does not say that it was the conveyance of a right to select two *sitios* thereafter to be identified and located within the prescribed outboundaries. It purports to be the final act of the government—the investiture of a complete title to a specified tract, with no future act to be performed.

“The contention however is that inasmuch as the grant purports to be of only two *sitios* and the original sale, having been made in 1812, must have been a sale of a limited quantity, and the outboundaries mentioned in the grant containing in fact an area in excess of two *sitios*, it must be construed as a sale of a certain limited quantity to be thereafter selected within a larger tract and was necessarily in the nature of a float and not located within the meaning of the treaty.

“This contention demands consideration.

“The grant recites that the original sale was made in 1812; therefore it must have been made under section 81 of the Ordinance of the Intendants as modified by the royal order of February 14, 1805 (Reynolds, 68). This ordinance required, and it was the practice, that no more than four *sitios* could be sold to one person of wealth and no more

than two to a poor person; that the lands should be surveyed and appraised and not be sold for less than the appraisement, and that the appraisement should not be less than certain fixed sums, regulated according to the character of the land.

"Having in view these provisions and the recitals in the grant document, it is a necessary inference that the original sale was for a certain quantity of land, at the place specified, which had been surveyed by officers duly authorized to make the survey and appraisement in pursuance of the royal order.

"The question is therefore presented squarely, do not the proceedings of the survey, appraisement, sale and conveyance operate as a location of the tract sold within the meaning of the treaty?

"In my judgment the proceedings do have that effect.

"The essential feature or object of the proceeding was the protection of the revenues to insure a fair value for the lands sold. To secure this end was the object of the appraisement. This was practically the only protection there was. The law fixed a minimum limit.

"Now, what is an appraisement, except an appraisement of a certain thing? How can a man appraise two sitios of land unless he knows what two sitios? How could the appraisers know what two sitios they were to appraise? Why, this was the very object of the survey, to mark out on the ground the tract to be appraised and sold.

"To survey a tract of land means to mark it on the ground, not in the air, nor on paper. The surveyor was an officer of the government delegated to mark on the ground the tract sought to be purchased. When the survey was completed appraisers were summoned and sworn to appraise the tract of land surveyed. They were not authorized to determine whether the survey was correct or not, or whether it contained a greater area than the quantity sought to be purchased. In fact, they were not supposed to know what area was contained within the boundaries, nor what quantity was petitioned for. The surveyor was authorized to fix the boundaries and determine the quantity of land within these boundaries. The appraisers could not go 'behind the return' of the surveyor as to the area of the tract surveyed. That was their guide and they appraised that tract identified by the boundaries adopted by the surveyor as to the two

sitos of land which was the quantity determined by the surveyors to be contained within the boundaries.

"By that survey and appraisement the land was offered for sale at public auction at the capital of the district many miles from the land and all the world was invited to come and buy; so I may say that the only fair construction of the transaction is that by the intent of the parties the out boundaries established by the surveyor were the boundaries of the two sitios appraised and sold and evidenced the location of the tract sold.

"Presumptively, the survey was correctly made. The presumption of law is that an officer does his duty. Wherever the determination of any matter is committed to a public officer, the determination so made is binding until set aside in a proper proceeding. An error in the determination cannot be shown in a collateral way.

"No survey is ever perfectly accurate. Never were two surveys made precisely alike. They are pre-eminently matters about which different men reach different conclusions. If the survey were in fact erroneous, covering an excess of land over the quantity directed to be surveyed, such error would not render the survey or subsequent proceedings based thereon void as to such excess, but render it voidable only as to such excess.

"The error or mistake in the survey did not appear upon the face of the proceeding.

"Now, it is a principle universally recognized that an official proceeding, which is not void upon its face but voidable only by reason of some mistake or error in the course of the proceeding, is valid and binding until set aside, or annulled in a direct proceeding for that purpose.

"The Supreme Court in *Graham v. U. S.*, 4 Wall., 59, and *U. S. v. Pico*, 5 Wall., 536, has clearly indicated that the proceedings of these officers in surveying and establishing the boundaries of tracts of land for purposes of segregation from the public domain are in the nature of a judicial proceeding and have all the force and effect of judicial determination binding upon the former government.

"By this it is not meant that they are *res judicata*, finally and conclusively binding. A mistake is always open to correction, but can only be corrected in a proper proceeding.

"The idea I seek to emphasize is well expressed in *Smelting Co. v. Kemp*, 104 U. S., on page 640:

"The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of the title the law has made numerous provisions designating the persons who may acquire it and the terms of acquisition. That the provisions may be properly carried out, a Land Department as part of the administration and executive part of the Government has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment."

"The views thus expressed are equally applicable to the proceedings of Spanish and Mexican officials in the disposition of the public domain. They are not merely an exposition of a peculiar rule of American law, but the expression of hard, common human sense applicable the world round.

"My conclusion, therefore, is that the proceedings of the survey operate as a determination that the boundaries of the two sitios are the landmarks specified in the report of the survey, and that this determination remains true and binding until set aside in a proceeding for that purpose.

"Such, it seems to me, was the view of the matter taken by both Spain and Mexico as shown by the practice of those governments. By a proceeding of denunciation and composition, lands within these surveyed boundaries could be surveyed, and if an excess were found it could be appraised and sold; but I think I can safely say that there was no other way in which the excess could be reached until denunciation was made and a determination was had of the question of an excess—that is to say, until the original

survey was directly proceeded against and determined to be erroneous, the purchaser under the original proceedings held the possession and dominion of the entire tract by its surveyed outboundaries against all the world. By the original proceeding the entire tract was segregated from the public domain and remained segregated until by a proceeding, under a denouncement for that purpose, the excess, or demasias, was established or adjudged to exist and as such subject to sale. Until that occurred, there was no excess or demasias."

Our contention as to the construction of this title is, as heretofore stated, that the parties applied for the whole of the given tract according to the boundaries as stated in the application, and that a survey was made for the purpose of ascertaining the area of the tract, and that the whole tract was sold, the only error being that there was a mistake in computing the area of the tract.

The opinion of the lower court, however, states that "the expediente in this case shows that 6½ *sitios* were surveyed and appraised, and that the petitioners were satisfied with the result."

With the utmost respect, we suggest that the foregoing statement is in direct contradiction of the record. Six and one-half *sitios* were not surveyed. There was only one survey, which was of the whole tract, a later survey showing that the tract contains much more than 6½ *sitios*. As we have heretofore shown, it was "the whole of the surveyed land" which was appraised. The particulars of the appraisements, as set out on page 137 of the record, eleventh line from bottom, state that the lands were appraised as follows: "The 6½ *sitios* which compose the survey of Agua Prieta, one in the sum of \$60, on account of having a small spring, and the other 5½ at the rate of \$15 each on account of their being absolutely dry." The other lands surveyed were appraised "one *sitio* at \$80, another at \$60, and the rest at \$15." The court will notice that the land was sold

with regard to quality as well as to quantity, and this is true in all the Sonora grants. The purchasers herein were not buying an unsurveyed, undesignated quantity of land, but, on the contrary, were buying land specifically identified by the fact that part contained water and part did not. The land was of different value in different parts of the tract, and the appraisements at these different valuations contemplated the sale of the specific land so appraised. In fact, it seems idle to urge that the parties were buying an unsurveyed, unidentified right to lands to be located by a subsequent survey, or that a decision giving them a fixed quantity of land, which might all be dry, would accord with the intent of the parties, which was to buy certain specified lands, part of which were watered.

To put our contention in a still different form, we ask: Why was the quantity which was appraised and sold stated to be $6\frac{1}{2}$ *sitios*? There can be but one answer to this, and that is because that was the area of the tract as determined by the officers of the Mexican government; therefore in selling $6\frac{1}{2}$ *sitios* they sold the whole tract. So far as any one knew, the tract contained $6\frac{1}{2}$ *sitios* and no more, and to suggest that the Mexican authorities sold this amount and reserved the balance is a contradiction in terms, because no one had any idea that there was any balance or excess to be reserved. The petitioners were satisfied with the area, because this was an official statement to them by the proper Mexican authorities as to the contents of the tract. They desired to purchase it and were willing to pay the price therefor. If the surveyor had reported that the area was 10 or 12 *sitios*, or any other quantity than the $6\frac{1}{2}$, the only difference in the proceedings would have been that a correspondingly greater price would have been paid. In any and every event, the tract as an entirety would have been sold.

The lower court further states:

"We are of the opinion that this was clearly a sale by

quantity and falls within the rule laid down by the Supreme Court of the United States in the cases herein referred to. To hold otherwise, we would have to presume that the officials of Mexico either did not understand the law regulating the disposition of the public domain, or knowingly violated its plain provisions."

As to this we submit, with great respect, that there is nothing in the record justifying this language or conclusion. The laws under which this grant was made are fully set out in Reynolds' Land Laws, p. 186 *et seq.* Article 28 provides that—

"To no one who is a new breeder shall more than four sitios be given; but to those who need more, from the abundance of their stock, the treasurer shall grant only what they need, after taking the evidence referred to in the preceding article, assuring himself of the truth of the application by all the means within his reach before making the grant, to which end he shall see that the parties in interest take no part in the proceedings he may institute to attain that object."

This was done, and it was determined by the testimony of disinterested witnesses that the applicants had need of all the lands they petitioned for.

Article 66 *et seq.* refer to the survey of lands. These laws of Sonora, following the laws which had existed under the intendants, provide that lands could be sold only after they had been surveyed and appraised. In Sonora nothing was known of a grant which consisted of a sale of an undesignated quantity of land, to be afterwards surveyed within exterior boundaries. Such floating grants were made in California under different laws, but were never made under the laws of Sonora governing grants similar to the one under consideration.

In the case at bar the survey of the lands had been made strictly in accordance with law.

The appraisement was regulated by article 64, fixing for

dry sitios a minimum price of \$15, and for those that have a spring or river \$60 each.

The appraisement herein was in conformity with law, and no criticism can be made as to the regularity of any of the proceedings. We therefore ask, What ground is there for the statement of the lower court that the Mexican officials "either did not understand the law regulating the disposition of the public domain, or knowingly violated its plain provisions"? There was only one error, which was as to the area of the tract, and this was a mistake of fact, not ignorance of law or a violation of it. In endeavoring to sell the tract and in strictly following the law as to a prior survey and appraisement, they fell into an error in this case, as in every case, as to the area, but this was the only mistake of any sort in the proceedings.

On our theory that the purchasers bought the whole of the tract, the lower court erred in dismissing this petition for the reason that "the evidence shows that the 6½ sitios constituting the cabida legal, which is the quantity covered by the title, lies south of the international boundary line in the State of Sonora, Mexico." The phrase "cabida legal" has no application to a case where the whole of a tract was sold, because in such a case the purchaser acquires title to the whole, whether it be more or less.

Neither could the foregoing ruling of the lower court apply to a case where the land is of different quality in parts and was bought and paid for at different prices based on the different qualities. If a tract is of uniform quality without, it might perhaps be urged in some cases that a given quantity anywhere within the tract would answer the purpose of the sale; but in this case to restrict the grantee to the cabida legal, measured from the initial point, when there is nothing to show that this would not exclude the watered sitio, for which he paid \$60, would palpably be unjust.

IV.

We submit that this sale was, under the civil law, a sale *per aversionem*, and that it exactly fulfills the requisites of such a sale. It shows the starting point and the dividing lines with the adjoining tenements. The record states (p. 362) that the owners of coterminous lands were summoned before the survey was made. The title paper assigns existing visible boundaries to the lands, viz., the natural objects called for, and the sale seems to come strictly within the definition of a sale *per aversionem* as given in *Voice vs. Cage*, 7 La. Au. 672.

Again: It was the sale of an immovable property where the lines were designated, and under the law as stated in Hall's Mexican Law, section 2109, the vendor would be obliged to deliver all that is comprehended within such lines, although there may be an excess in the measure expressed in the contract.

Again: It is the sale of the whole of a certain tract by so much per sitio, where the vendor expresses the number of sitios, and under the civil law as stated by Schmidt in his Civil Law of Spain and Mexico, article 612, page 134, the vendor is bound to deliver to the vendee the whole, though it exceed the quantity.

V.

We have urged as the fifth point in our brief that in Sonora where questions of excess arose, due to inaccurate surveys or computations of the area of lands, the remedy was by a further payment by the grantee and not by any reduction of the land surveyed, if the grantee choose to make the payment and retain the land.

Law of Sonora, May 12, 1835, cited in *Ainsa vs. U.S.*, 161 U. S., 208.

No exception has appeared to the rule that all of the grants were inaccurately surveyed, and that in every one the amount actually contained within the boundaries is found to be far in excess of the quantity stated. The rights of the purchasers may therefore be considered in two lights:

1. What were their rights by virtue of the grant itself before there was a second survey and before it was shown that there was an excess?
2. What were their rights after there was a second survey and after it was shown that there was an excess?

1. At the risk of some repetition, we submit that the grant itself was the final act of the government, the investiture of a complete title to the specified tract identified by the survey, with no future act to be performed. It was the designation of the land, made in the same manner and with the same effect as the delivery of juridical possession in California, the difference as to time being that in Sonora the lands were surveyed and possessed prior to the delivery of the grant. The boundaries established by the survey were the boundaries at which the purchasers were to place monuments of stone and mortar, as provided by law. These boundaries were "their boundaries" and were the official designation by the government of the land sold. As stated by Justice Sluss in his opinion set out above, "the purchaser under the original proceedings held the possession and dominion of the entire tract by its surveyed outboundaries against all the world."

The original proceedings were not the sale of a right to locate the quantity within the boundaries, for the very simple reason that the boundaries were not known to contain any more than the quantity. The very object of the survey was to locate and identify the quantity prior to the sale.

To every part of the land within the boundaries the

purchaser had therefore an equal right of possession and ownership.

Mistakes in surveys were not confined to Mexico, nor is the position which we are here advocating a new one. On the contrary, it was announced by Chief Justice Marshall at an early day and has always been followed. The case of *Taylor vs. Brown*, 5 Cranch, 234, was one where under a warrant for 2,000 acres, 3,025 acres had been surveyed. In delivering the opinion of the court Chief Justice Marshall said :

“ The warrant, it is said, was an authority to survey only 2,000 acres, and, for the surplus, the survey was made without authority.

“ It is a fact of universal notoriety in Virginia not only that the old military surveys but that the old patents of that country generally contain a greater quantity of land than the patents call for. The ancient law of Virginia notices this fact, and provides for the case. It prescribes the manner in which this surplus may be acquired by other persons, and it is worthy of notice that the patentee must himself reject the surplus before it can be acquired by another, and, after having so rejected it, he has the election to allot it in such part of the patent as he pleases.

“ The survey is an appropriation of a certain quantity of land by metes and bounds, plainly marked by an officer appointed by the Government for that purpose, and it would seem that the Government receives his plat and certificate as full evidence of the correctness of the survey. This being the case, it is admitted by the Government to be an appropriation of the land it covers, and it is difficult to discern a rule by which the survey could be reduced on a caveat by the owner of an interfering survey unless the entry on which it was made was in such terms that the excess might be considered as surveyed contrary to location. For to every and to each part of the land surveyed, its owner has an equal right. * * *

“ It is proper to premise that there is but one species of cases in which any court of justice is authorized by our land law to divest the owner of a survey of the surplus included within its boundaries, namely, when the survey was made

posterior to an entry made by another person on the same land; and to do more would be unequal and unjust, inasmuch as a survey which is too small cannot be enlarged."

The case of *Taylor vs. Brown* was cited and followed in the early California case of *Vanderslice vs. Hanks*, 3 Cal., 28, where the court showed that even where the grant provided for a measurement and reservation of surplus "it was a grant of title to the whole, with a defeasance as to the surplus." The court said that "until the proper proceeding is adopted to restore the surplus to the public domain to every and to each part of the land granted, its owner has an equal right."

It is not believed that this reasoning of Chief Justice Marshall can be criticised in any respect, and we take it as a proposition that cannot be controverted that in every one of these Sonora grants the legal title and ownership of the whole of the tract which had been surveyed passed to the purchaser by virtue of the original title papers, though by mistake more land was included than was paid for.

2. Rights of the parties as to the excess.—As to this we submit that the grantees had the right to remain in the ownership of any surplus that might be afterwards ascertained; that such right was conditioned only on a further payment for such excess; that this right was properly protected by the treaty, and that this court has power to recognize and enforce such right by virtue of the further payments or tenders made by the grant claimants, as shown by their supplemental petitions.

The question of an excess does not, we think, properly arise in this particular case. Where a certain quantity is applied for, but, by reason of the inaccuracy of the survey, the purchaser acquires title to more than this quantity, the propriety of a further payment may be considered, but in this case we have argued that it was the intention of the

parties to sell the whole of the tract, and that the purchaser acquired the same, whether it were more or less than the amount stated.

The rights of grantees as to what is found to be an excess were clearly defined and fixed under the Mexican law. Not only the principles of natural justice but the rules of the civil law as well give an explicit answer to the questions regarding these excesses.

The principle of justice laid down by Chief Justice Marshall is that the owner is entitled to retain the whole of the tract if he so desires. The patentee must himself reject the surplus before it can be acquired by another, and, after having so rejected it, he has the election to allot it in such part of the patent as he pleases.

The survey was a designation by the Mexican government of the tract sold. The purchaser supposed that he was buying this surveyed tract which he had examined during the survey. He had no reason to think that the survey was inaccurate or that there was in the tract any more land than he was paying for. The government sold and the purchaser bought the designated tract, the only error being as to its area. As repeatedly stated heretofore, the object of the survey was to locate the very land to be sold—to locate it on the earth's surface.

Now, it might well be that the tract as a tract might be desirable to the purchaser, while the tract as curtailed might be of little value. Suppose the tract as originally surveyed contained a spring at each of the four corners and water nowhere else. The tract, if it included these springs, would be valuable. If, however, it were discovered that the measurements were inaccurate and they were restricted to the exact length and thus failed to include the springs at the corners, the tract as thus corrected would be of no value. The sale would have been made according to an appraisal based on the quality of the land as specifically including the springs, whereas a grant by quantity only measuring

the exact distances from the central point would, under the circumstances supposed, give the grantee only a grant of dry land, which would be of no value to him for ranching purposes, and would be a wholly different grant from what he had bought and paid for. The grantee would naturally say: "I bought the whole tract because it had water on it. The tract without this water is valueless to me." The Mexican government would say in effect: "But you pay for only a certain quantity, and by a mistake in the survey you have acquired title to more than that quantity." To this the reply of the grantee would be: "I will retain the tract and make an additional payment for the excess. I did not know that there was any error as to the contents of the tract. If the proper area had been ascertained at first, I would have paid the sum called for, and now that it has been ascertained that there was an error, I am ready to pay what I would have paid at the time."

The foregoing fairly expresses what was the law of Sonora at the time this grant was made and continuously up to the treaty. Articles 1 and 2 of the law of Sonora, of May 12, 1835, are as follows:

"ART. 1. Those who have acquired property in lands of the State by lawful title are owners in good faith, even when they have lost that document, for they are entitled to re-validate it upon proof of the incident that may have occurred.

"ART. 2. Those are likewise *bona fide* owners who under the descriptions given in their records of survey occupy some excess of land; and they are entitled to such excess, even after such excess is shown, without any other requirement than that of paying for the excess in accordance with the quality of the land and the price which prevailed when the land was measured and appraised; and only in case the owner does not want the excess, or when such excess is very great in the opinion of the Government upon the report of the treasurer, shall such excess be awarded to any one denouncing or soliciting it; and such persons shall bear the expense of the resurvey, if the excess has not been ascer-

tained. In lands measured by calculation (graduacion) none shall be regarded as excess that does not exceed half a sitio."

There was no law under which the Mexican government at any time made a new survey of grants, and there was no obligation on the part of the grantee to do so. Such proceedings were instituted at the instance of some third person in the hope that some excess might be discovered which the grantee would not care to retain.

No resurvey of this Agua Prieta grant had been made prior to the treaty, and, of course, up to that time there were no demasias or excess.

The very definition of demasias implies that there must have been a second survey or examination revealing the error in the first survey. Surplus lands (demasias) are defined "to be those held by private persons on primordial title, and to a greater extent than specified, such surplus, however, being within the boundaries mentioned in the title and consequently mixed up in its entirety with the area for which a title is held."

Mr. Orozco, a Mexican jurist, at page 345 of volume 1 of his works, discussing the law of March 26, 1824, defines demasias as follows:

"We have already said that this overplus (demasias) consists of agrarian quantities which result within a well-identified perimeter between the area covered by title and the area which the perimeter fixed by the respective title encloses *de facto*. Thus, for example, if the title concedes 1,000 hectares (2,470 acres) of land within fixed and determined monuments, and upon a new examination of it it is demonstrated that within these monuments there is not 1,000 but 1,500 hectares, (3,706 acres) this excess of 500 hectares (1,235 acres) is what is today called national overplus (demasias nacionales)."

This law of Sonora continued in force up to and after the treaty. In the Nogales expediente set out in *Ainsa vs. U.S.*

161 U. S., 208, at page 226, the Mexican Attorney General, under date of December 5, 1842, six years after the constitution of 1836, specifically refers to "the provisions of the last clause of article 2 of decree No. 51 of the 12th of May, 1835, of the old State and which is still in force." The State laws relating to sales of land continued in force under the various forms of government and after the decree of September 17, 1846, which again classified the revenues of the General Government and the States. The Canoa grant was confirmed by the lower court and this court in *U. S. vs. Maish*, 171 U. S., 242. That was a grant where in 1849 the substitute Treasurer General of the State of Sonora issued title papers on a grant which had been instituted in 1820, thus clearly showing that the State laws were in force in 1849.

Moreover, it is shown by the Mexican archives at Hermosillo that the above-cited law was in force up to and after the treaty, and that the subject of *demasias* was acted on year after year in accordance with the provisions of the law of 1835. A *reseña*, or catalogue, of all grants existing in the archives at Hermosillo has been printed by Mr. Rochin, the official keeper of the archives, and a copy has been for years open to the inspection of government counsel and the lower court. In our printed brief in this case in the lower court we called attention to the fact that the subject of *demasias* was continually acted on in the following, among other, cases: Baviso grant (p. 12), in 1852; in 1824, Capulin grant (p. 20); in 1842, on proceedings begun in 1839, Curea grant (p. 25); in 1849, on *demasias* denounced in 1846, Casita grant (p. 30); in 1852, Chupisonora grant (p. 33); in 1835, Carrizo grant (p. 35); on a grant instituted in 1782, Cachagua grant (p. 36); in 1850, Carrizal de Tenas grant (p. 37); in 1770, on proceedings in 1769, Imalda grant (p. 50); in 1850, Mezquite Dulce grant (p. 65); in 1853, Monreales grant (p. 66); in 1852, Pozo de Crisanto grant (p. 77); in 1830, Robertos grant (p. 91); in 1850, Sibachicori grant (p. 98); in 1853, Sonibiate grant (p. 98); in 1817, Santa

Maria grant (p. 113); in 1844, San Antonio grant (p. 115); in 1842, San Francisco grant (p. 115); in 1847, San Juan grant (p. 128); in 1849, on proceedings in 1847, San Francisco grant (p. 129); in 1853, San Antonio grant (p. 129); in 1847, Sivachicori grant (p. 130); in 1824, Tonibavi grant (p. 148).

The *Reseña* further shows that the baldíos and demasias between the Carrizal and other grants were adjudicated to one Garcia in 1855, and also shows (p. 141) that title to the demasias of the S. Jose del San Jon grant was issued in 1855.

We believe that the practical construction given by the Mexican officials to their own laws at the time is of far greater value than any speculations or theories that may be advanced at the present day. As this court has said in Hornsby's case, 10 Wall., 224:

"We cannot, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were entrusted with their execution."

The construction given to this law of May 12, 1835, is that the owners were entitled to any surplus; that this was their right, and that this right continued in force up to and after the treaty. The language of the law of 1835 is that the owners are "entitled" to such excess. This is the same word used in the first article, which provides that owners who have lost their title paper are "entitled to revalidate it." Evidently where a man had in good faith bought lands from the State, and had lost his document, he had in natural justice a right to acquire a copy thereof. That was not a privilege which, in justice, the State could extend to him or deny at its pleasure. Neither was the payment for the excess a privilege. It also was a right to which the grantee was entitled, and was based, as we have attempted to show, on the fact that the government had designated to

him the land which it sold, and it could not, in justice, take any part of the tract from him if he was willing to make a further payment.

The whole body of the Mexican law as to demasias is absolutely founded on the principle that the original grantee had the unqualified right to make a further payment and retain the surplus whenever the same might be ascertained. The law of July 22, 1863 (Hall's Mexican Law, pp. 173, 175), shows (art. 5) that the possessor had the right to retain the public land "if he had possession for ten years or a title translative of dominion." In order to determine the extent possessed, "it shall be (art. 6) within the limits mentioned in the title, even when they are not in conformity with the amount of land." "In the two preceding articles is comprehended the public land confounded in its totality with the fields which are not sold, or comprehended within them" (art. 7).

Article 8 provides that where the lands are denounced by a third person the original grantee "will concede the land to the denouncee, or pay him its value according to the tariff price in cash down."

We submit that this is of the greatest weight as showing that in every case the remedy for the excess was by a further payment and not by taking from the original purchaser any portion of the land if he cared to retain it.

In *U. S. vs. Moreno*, 1 Wall., 400, 405, this court said:

"A right of any validity before the cession was equally valid afterwards. The act recognizes alike legal and equitable rights and should be administered in a large and liberal spirit."

So in *Ely's Adm'r vs. U. S.*, 171 U. S., 220, the court said:

"The Government promised to inviolably respect the property of Mexicans. That means the property as it then was and does not imply any addition to it. The cession did not increase rights. That which was beyond challenge before

remained so afterwards. That which was subject to challenge before did not become a vested right afterwards."

It cannot be doubted that if this excess had been discovered at any time prior to the treaty and the grantees could properly be called on to pay for same, they would have had the right to make such payment and remain in possession of the whole of the tract. In all of the cases which have been cited and examined by the undersigned it does not appear that this right was ever once called in question. It was a property right which remained inviolate. This Government can undertake to curtail these grants only under the theory that it has succeeded to the rights of Mexico and can do what Mexico herself would have done, and then we are in a position to rely on the law that the grantee could pay for the surplus and retain it.

VI.

LOCATION OF THIS GRANT.

The greatest part of the testimony offered by the Government was an attempt to show that this grant as originally surveyed was wholly south of the present international boundary line. If this were true, it would be unnecessary to discuss any other point; but this attempt is shown by the evidence to be absolutely futile.

The map of the grant made by Mr. Bonillas, facing page 24 of the record, was conceded by the Government to designate correctly the center point, Agua Prieta. (See testimony of Mr. Flipper, pp. 43, 44.) This witness further testified that the south center monument, which is 59 cords south from the center, is correctly designated on the Bonillas map. The west center, southwest and southeast monuments, as designated by Mr. Bonillas, were not called in question. Thus, no exception was taken to the part of the Bonillas survey

south of the line. It is admitted that the southern monuments are correct, or, at any rate, those that were visited were specifically admitted to be correct, and those that were not visited were not questioned in any respect.

The controversy turns on the location of the northeast corner and of the east center monuments.

The north center monument is not at any conspicuous point in the topography of the valley, but was located with reference to the Silla pass, the northeast corner. The description of the title paper of the north center, the east center, and the northeast monuments is as follows:

"Returning to the center, the direction of the north was taken, and going up the valley, there were measured 100 cords, which ended on a very small hill, fronting towards the east with the pass called La Silla, having ordered a heap of stones to be placed there, and a cross as a monument.

"Returning to the center the direction of the east was taken, and towards it were measured and counted 168 cords, which ended on a high hill which is found on the right of the pass (which is there) through which passes the old road from Santa Cruz to San Bernardino, where I ordered placed a heap of stones and a cross as a monument.

"I, the judge commissioner, in order to continue these proceedings, went with the appointed officers to the northern monument, and having taken the direction of the east, there were measured and counted toward it 168 cords, which ended near the Silla pass, on the small hill that is to the right and near two larger ones, where I ordered placed a heap of stones and a cross as a monument."

The court will notice that both the northeast and east center monuments are located with reference to passes in the mountains, and that the northeast was near the "Silla pass, on the small hill that is to the right and near two larger ones," while the east center "ended on a high hill which is found on the right of the pass which is there, through which passes the old road from Santa Cruz to San Bernardino." As in making these descriptions the parties were looking to

wards the east, "to the right" would be to the south. To answer the calls of the papers, therefore, the northeast corner monument should be found on a small hill south of a pass—the Silla or Saddle pass—and near two larger ones, while the east center is on a high hill to the south of the pass through which passes the old road from Santa Cruz to San Bernardino.

The title paper in describing the northeast corner says that it is "en una loma pequeña," "on a very small hillock or hill which is to the right and very close or touching (*immediata*) two other higher ones," while the hill south of the pass at the east center is designated as a "loma alta," or high hill.

If the court will bear these descriptions in mind, the following discussion of the testimony as to the location of the calls will be seen to be relevant and, we think, conclusive.

The contention of the Government was that the pass taken by the claimants as the east center monument is the northeast monument and is south of the international boundary line; that the east center monument is somewhat south of this northeast monument, and that the northwest corner was also south of the line, thus placing the grant, as originally located, wholly in Mexico. The Government witness Flipper, who, in this as in all the other cases, has found it impossible to locate the calls as the other surveyors do, testified as follows (p. 53):

"Q. Then your assumption or theory is based on the supposition that the point described by Mr. Bonillas as the east center monument is in fact the northeast monument? A. That is my theory.

"Q. And if it is true as a matter of fact that the northeast monument of this grant as originally surveyed is what is termed the Silla pass, the northeast corner as laid down on Bonillas' map, you would, of course, have a different theory. A. If that is true, why certainly.

"Q. If the old road from Santa Cruz to San Bernardino is correctly represented on this international boundary map,

is it not true, in your opinion, that the monument on the loma south of that is the east center monument of this grant? A. If this is the old road referred to in the old title paper, then that would be true."

THE NORTHEAST CORNER MONUMENT.

As to this monument Mr. Bonillas testified as follows (p. 16):

"The northeast corner monument I also found at the place described in the title papers. The Puerto de la Silla was pointed out and described to me with all precision possible. It is the first pass north of Gallardo, and is so called from the perfect outlines of a saddle formed by the profile of the northern extremity of the Perrillo mountains, now known as Swisshelm mountains, the horn of the saddle being formed by College peak, also known in the locality as Silver peak. * * * The northeast corner is on a very small hill at the Puerto de la Silla.

"Q. What does that mean? A. It means the Saddle pass, and I was told that the reason it was named that way was from the perfect outlines of a saddle in the mountains right where the Swisshelm mountains end towards the north.

"Q. State whether or not the mountains present any such outline? A. They do very distinctly, and it is a very noticeable feature, and the horn of the saddle is formed by a high peak called College peak, and from the horn it slants down and curves just like a saddle."

The report of Mr. Oury as to Saddle pass is, like the testimony of Mr. Bonillas, as full and clear as could possibly be imagined. We give it as follows (pp. 188, 189):

"The location of the northeast corner is described in the expediente as being on a small hill to the right and adjoining the 'Puerto de la Silla,' or Saddle pass, and near two other higher hills.

"I made diligent inquiries of several settlers in the neighborhood who did not know what was known as to the Paso de la Silla, but my guide, who was born in Fronteras some fifty years ago, and who has lived in this neighborhood all his life, claimed he knew the pass known by that name, and

he took me to a broad pass situated at the south end of the Swisshelm mountains near what is now known as Silver creek, and used by travelers crossing from this portion of the Sulphur Spring valley to the San Bernardino valley. To the right of this pass, on a small round hill, near two other higher ones, I found a monument of stones, which I took as the northeast corner of the claim.

"I regard of importance to state further that at the point where this pass lies the profile of the adjoining mountains shows very perfectly and noticeably the outlines of a saddle, the round and abrupt Silver peak serving as the horn.

"In addition to the above, it is to be remarked that between the pass where the east center is located and the one where I established the northeast corner, there is no other broad and commonly traveled pass in the mountains. These reasons led me to believe, though it is not now commonly known by that name, that this divide was in former times known as the *Paso de la Silla*."

("South" end of the Swisshelm mountains is evidently a mistake. It should be "north" end.)

Here are two witnesses who carefully and accurately locate the northeast corner exactly in conformity with the calls of the title. As the location of this corner is a matter of vital importance in the case, one would suppose that the Government's witnesses would have gone to this corner to see whether the description given by Bonillas and Oury was accurate, but it is a matter of surprise, to say the least, that although ample time was afforded the Government witnesses to examine this monument, they wholly failed to do so. Mr. Flipper testified (p. 46):

"Q. Have you or have you not been at the point designated on this map as the northeast corner, being Puerto de la Silla or College peak? A. I have not."

On page 36 this witness testified:

"Q. Do you know what is known as—what has been testified to as College peak by Mr. Bonillas and his map filed by him and his testimony taken at the last session of this court? A. Yes, sir."

We ask the court to note that this testimony of Mr. Bonillas was given in February, 1899. On motion of the Government further hearing of the case was suspended, and Messrs. Flipper and Tipton made their examination of the monuments in April, 1899, and testified in May, 1899. Mr. Bonillas' testimony was thus fully before these gentlemen and open to their criticism, but not one syllable was introduced by the Government tending to disprove his testimony that the point taken by him as the northeast corner exactly corresponds with the calls of the expediente. If there had not been at this place "a small hill that is to the right and near two larger ones," the Government's witnesses could have so ascertained by an examination of the place and could have so testified. If this Saddle pass does not in fact conform to the detailed and minute description given of it by Mr. Bonillas and Mr. Oury, the testimony as to its perfect resemblance to the outlines of a saddle could have been controverted. In view of the ample opportunity afforded the Government to disprove this testimony and the failure of the Government to attempt in any way to do so, we ask with the greatest seriousness whether it is not a legitimate and indeed irresistible inference that the Government concedes this testimony to be true? As it was direct and uncontradicted in any way, under the ordinary rules of evidence it must be accepted.

It would have been much fairer, we think, if the Government witnesses had not avoided this northeast corner. Claimant's witnesses had directly testified that it conformed to the calls of the expediente. This was an issue that the Government was challenged to meet. If the Government witnesses had gone to this point and had found that it answered the calls of the expediente, it would have been justice to the claimants so to testify. If it did not answer the calls, the Government's case would have been materially aided by evidence that Bonillas and Oury were in error. It would seem that positive testimony should have been offered

by the Government as to the location of this call, but no Government witness visited it. This certainly was not what might have been expected, unless the failure to do so is to be taken as an admission of the correctness of the claimant's testimony.

THE EAST CENTER MONUMENT.

This monument, as heretofore observed, is on "a high hill which is found on the right (south) of the pass which is there, through which passes the old road from Santa Cruz to San Bernardino."

The evidence as to this monument seems absolutely conclusive that it is correctly designated by Mr. Bonillas on his map as the east center monument, because it is identified by the high hill to the south, and the evidence is likewise conclusive that it cannot be the northeast corner, as claimed by the Government, because near this pass there is no "small hill that is to the right (or south) and near two larger ones." These facts were established by all of the witnesses. Mr. Benillas testified as to the east center monument as follows (p. 17):

"The description of the point where the east cruz monument was placed is so precise and clear, in the original field-notes that I encountered no difficulty in identifying it. I inquired of people from Fronteras and Santa Cruz who traveled forty or fifty years ago over the road leading from the latter town, then a presidio, to San Bernardino, and from a man who was a soldier among the escort of the Mexican boundary commission while making the original survey of the international boundary, and the answer is uniformly the same, that the road leading from Santa Cruz to San Bernardino crossed the Ceniza or Perrillo range of mountains through the Gallardo pass, north of the well-known butte called Gallardo. The same road is traveled today, as it is the most direct route between the two places mentioned, and the one which offers less difficulties to travelers both on vehicles and on horseback. Led by my guide, I followed this old road from the creek in the center of the valley in

an easterly direction to Gallardo pass, where the international boundary monument No. 82 is located. From there I went to the top of a high hill, which rises to the right or in a southerly direction, where I found a large old monument of loose stones, at the foot of which a cross formed of the same material can be clearly defined. * * * I found this high hillock, with a monument on the top of it, which answers perfectly, to my mind, the calls of these title papers."

Mr. Oury's report as to this east center monument is as follows (p. 187):

"Returning again to the center, I go in an easterly direction along what is commonly known as the old overland road to California, and which is the same road leading directly from the town of Santa Cruz, Sonora, Mexico, to the San Bernardino valley, and on the top of a high hill situated on the south side of the divide or pass through which this road crosses the mountains, I found a large monument of loose rock. This answering so precisely the description of the location of the east center monument of the claim given in the expediente, I take it as such in my survey."

This pass with the high hill south of it, on top of which is a monument, was identified by Mr. Flipper just as clearly and accurately as by the witnesses for claimants. That gentleman testified (p. 49):

"Q. You take the tracing of the international boundary line; you see there that line marked 'road from Santa Cruz to San Bernardino'? A. I do.

"Q. You see where the line is with reference to monument No. 19? A. I do.

"Q. That point at the monument No. 19 is a pass in the mountains, is it not? A. It is.

"Q. In the pass and south of that point there is a loma alta? A. There is a loma alta.

"Q. On that loma alta there are two large monuments? A. On this loma alta there are two large monuments on a line nearly north and south."

This pass taken by claimants as the east center is shown by the absolutely uncontradicted evidence to answer in every respect the call for the east center. It cannot be the northeast corner, as the Government contends, because at this pass there is no "very small hill to the right (or south) and very near (or touching) two larger ones." Mr. Flipper further testified as to this east center monument (p. 49):

"Q. Are there any higher hills immediately near this loma alta, about which you have testified? A. Not immediately close to it. They are north.

"Q. Are there immediately near it (the loma alta) two other higher peaks? A. Immediately near it there are not two other higher peaks, but west of it there are several other higher peaks.

"Q. It (the supposed road through Misa pass) makes a detour around the southern part of this Gallardo peak and"

The Spanish for the hill at the northeast corner is, as heretofore quoted, "una loma pequeñita." Mr. Flipper testified as to the hill south of the east center monument (p. 59):

"Q. Is this phrase (place) which is denominated the east center monument una loma pequeñita? A. It is not."

He further testified (p. 57):

"Q. Are there immediately near it two other higher peaks? A. Immediately near it there are not two higher peaks, but west of it there are several other higher peaks.
* * * Immediately close to that loma there are no others, but a little bit west of it there are several.

"Q. How far distant are these peaks from these other lomas? A. About a mile I should judge."

This evidence seems to be as direct as is possible to be framed by language, that immediately near the point taken by the Government as the northeast corner there are not two other higher peaks. This point, therefore, absolutely fails

to answer the call for the northeast corner, which is on a small hill very near two larger ones. To sustain the contention of the Government the explicit language of the expediente will have to be set at naught.

Mr. Bonillas' testimony is equally clear. Regarding the northeast corner he testified as follows:

"Q. Will you translate this language 'en una loma pequeña que está a la derecha, y inmediata a otras dos mas altas'? A. On a very small hillock or hill which is to the right and very close to two other higher ones.

"Q. How near to this peak which you have termed the east center monument are there to the west any peaks higher than it? A. Approximately this is a high hillock, and that loma alta to the west extends for a considerable distance, but I do not know that I can remember any hills as high as it is, or higher, west of it, but about northwest from it there are some high hills there, high lomas and high cerros.

"(Mr. POPE:) How far west did you say it extended? A. It may extend for a mile, or three-quarters of a mile."

It is submitted that the theory of the Government that the Puerto de Gallardo is the pass mentioned in the title paper as the northeast corner is wholly opposed to the evidence, which, as above set out, shows that near this Gallardo pass there is no "small hill that is to the right (or south) and near two larger ones."

The witness Flipper further testified as to the topography at the point taken by claimants as the east center as follows (p. 45):

"Q. Do you find a hillock on the road to the pass through which passes the old road from Santa Cruz to San Bernardino? A. There is a high hillock on that road, but there is no high hillock on that map (referring to tracing of the international boundary line survey). I want to be understood as saying that there is a high hillock to the right. There are two roads from Santa Cruz to San Bernardino; which of these two roads do you refer to?

"Q. The one marked on the international boundary line?

A. There is a high hillock to the right of that road; it is very plain.

"Q. Please state whether that high hillock is correctly represented on the Bonillas map? A. It is correctly represented.

"Q. Did you find a pile of loose stones with a cross? A. It might be called a cross or a crescent or a T, according to one's imagination."

The court will see that it would be simply impossible to identify more clearly or fully a place exactly answering the call of the title paper for the east center monument. Here is the pass, the road through the pass, the high hill to the south, and the monument on top of the hill.

The Government contends, as heretofore stated, that the pass taken by the claimants as the east center is in reality the northeast corner, and that the east center is at a so-called Misa pass. We have heretofore called the attention of the court to the fact that the distinguishing feature of the call for the east center is a high hill which is to the right or south of the pass where the old road passes from Santa Cruz to San Bernardino.

The extended attempt of the Government to prove a Misa pass and some road through it is without effect, as we submit, because the so-called Misa pass is not shown to have any high hill to the right of it on which is a monument. The topography of the alleged Puerto de la Misa was testified to by Mr. Flipper as follows:

"Q. In the vicinity of this Puerto de la Misa, I will ask you to state whether or not there are any lomas? A. As you come out of the pass going westward there are any number of lomas lying to the west; also in the mouth of the pass, but outside of the pass.

"Q. Are there any lomas lying to the right of this pass as you go eastward? A. There are; there are lomas to the right of them and lomas to the west of them.

"Q. Are there any lomas to the right of the road coming from the west going through that pass? A. There are; yes, sir; and in the immediate vicinity of that road north of the pass."

All this utterly fails to show that the Misa pass, so called, has to the right or south a high hillock, with a monument on it. The distinguishing feature in the call for the east center monument is the "high hill which is found on the right of the pass through which passes the old road from Santa Cruz to San Bernardino." The pass is not identified with reference to the road, but the road is identified with reference to the pass to the right of which is the high hill with the monument. Let it be assumed, for the purpose of the argument, that all that the Government claims as to a road through the so-called Misa pass is true, and that the question to be determined is whether this road or the road laid down on the international boundary map and other maps is the road spoken of in the title paper. This question will be answered by determining which is the pass to the south of which is the high hill with a monument on it, and the uncontradicted evidence is that the pass taken by the claimants answers this call, and that the pass assumed by the Government does not.

We submit that the evidence as to the Silla pass, the Gallardo pass, and the so-called Misa pass establishes the following facts:

1. Near the Gallardo pass there is no "small hill that is to the right (or south) and near two larger ones."

This Gallardo pass, therefore, does not answer the description of the northeast corner.

2. The Gallardo pass exactly answers the call for the east center monument.

3. The so-called Misa pass does not answer the call for the east center monument because, according to the evidence, it is not the pass to the right or south of which there is a high hillock.

As to this alleged Misa pass, when the testimony is examined it will be seen that the only information which Messrs.

Flipper and Tipton got as to this appears to be from a Mr. Montano. Mr. Flipper had been at the place only occasionally. Mr. Bonillas, on the contrary, testified that he was familiar with the vicinity, having made other surveys. He said :

"I have been through that country repeatedly, and I think I am thoroughly acquainted with that country. I have been making surveys in there on both sides, on both valleys, by the Agua Prieta valley and the San Bernardino valley, and had occasion repeatedly to go into these mountains and others in connection with the making of surveys in the southern part of the San Bernardino valley and the Agua Prieta valley. I came across these mountains on horseback several times.

"Q. In your investigations in that country, making surveys or otherwise, did you ever hear of any pass called the Misa pass? A. No, sir. I never heard of a pass by that name.

"Q. Are you familiar with that part of the country which is identified by the witness Flipper, or termed by the witness Flipper, the Misa pass? A. I am perfectly familiar with that country.

"Q. What is that country termed by the witness Flipper the Misa pass; is it a separate pass from the Gallardo pass? A. I do not think so, because it is not a pass that goes from the southeastern side; there is a depression running from Gallardo to the south; I think it is continuous to this point which is now called the Ceniza pass and which is at the north end of the Ceniza or Perrillo mountains."

We ask the court now to consider, in addition to the facts heretofore presented as to the topography of the country at Gallardo pass, the additional further testimony. It is most confidently submitted that the court will find that the weight of the evidence is unquestionably that there is no such Misa pass. Mr. Flipper testified at one place that it "might be called a narrow valley instead of a pass."

JOHN H. SLAUGHTER testified that he had lived in Cochise county since 1879; that he had been sheriff of Cochise

county for four years; that he knew the place called Gallardo peak; that the road used by people to cross the Perrillo mountains going from the valley to the east to the Agua Prieta comes right by his ranch and right south of Gallardo; that he had traveled over the country represented by the Bonillas map very often; that the Perrillo mountains are crossed by people going from east to the west or west to the east south of Gallardo; "that is the only road that I know of;" "they come to San Bernardino and go out by Gallardo; that is the only one I know."

"Q. That is the only pass through these mountains as far as you know? A. Yes, sir; for vehicles south of this Gallardo pass and between that and the Ceniza springs; south of the Gallardo there is no wagon road that I know of unless it is a timber road.

"Q. Has there ever been any wagon road used south of the Gallardo by the people passing the mountains? A. Not that I know of.

"Q. Did you ever hear of a pass called the Misa pass? A. No, sir.

"Q. As far as you know, people in wagons crossing these Perrillo mountains cross through this Gallardo pass? A. Yes, sir.

"Q. They all cross there? A. Yes, sir, with their wagons; it is east of these mountains here.

"Q. About how wide is this Gallardo pass, the whole pass? A. It would be three or four miles, anyway.

"Q. And south of what you call the Gallardo pass you say there is no pass in the mountains where people cross with wagons, between that and the Ceniza springs? A. None, unless it has been lately made there. I have never seen any across it. There is no wagon road; the only road that I know of is a wood road over there from the Mescal ranch, unless there has been some made for hauling water or timber."

On cross-examination the witness was asked:

"Q. Now is it not true that northeast of the Puerto de la Ceniza, and about two and a half miles south of Gallardo peak, there is an opening in the mountain range through

which you can go on horseback or in a wagon? A. I do not know about it.

"Q. Do you know any place called the Puerto de la Ceniza? A. No, sir; I do not know any except at the Ceniza springs."

On redirect examination the witness testified:

"Q. You say that a man on a horse can cross nearly any place in the mountains without trouble, but you know of no wagon road crossing these mountains except the one that you testified about in this Gallardo pass? A. I know of no other crossing in the mountains."

Mr. Bonillas further testified:

"There is no wagon road there (at the so-called Misa pass) now, and there has never been a wagon road going through that point to the east of the San Bernardino valley. I have been there too many times on horseback and on foot, and no wagon road can go through there unless some money was spent to make it.

"Q. What is true, if you know, of any wagon road going through the pass which has been described as the Puerto de la Ceniza? A. There is no such a thing as a wagon road there, and never was one.

"Q. Do you know as a matter of fact how the people of Sonora who are east of the Perrillo mountains and some distance, say, from five to ten miles, south of the line, cross the Perrillo mountains to come west? A. They travel to the north to go to Bisbee, and if there were such a road through the Ceniza pass, or through this Misa pass, these people and the people living in there would save perhaps ten to twenty miles to go to the Agua Prieta country and thence to Bisbee if they could go through any such a pass as that. They all go around by San Bernardino and through the Gallardo pass. * * * I know that positively to be so. * * * No road goes across this depression to the Agua Prieta and San Bernardino valleys except to go through Gallardo pass. * * * I never heard of the Misa pass."

On cross-examination he testified:

"There is a road running out to the Agua Prieta valley

from the point that you call the Puerto de la Misa, but not east to the San Bernardino valley.

"Q. And you say there is no pass running from the main range of the Perrillo or Ceniza mountains between this line here and the north end of these mountains? A. No distinct pass, unless it is the same as the Gallardo pass; there are low hills in there.

"Q. What was your statement about people coming from Bavispe? A. They come in from the San Bernardino valley and then through the Gallardo pass and from Agua Prieta to Bavispe."

EDWARD CAMOU testified that he was fully acquainted with the location of Agua Prieta, the Perrillo or Ceniza mountains, and the peak called Gallardo, and of San Bernardino, Arispe, and other points.

"Q. Did you ever cross at the pass called the Gallardo pass? A. Many times.

"Q. State whether there is a traveled road over that pass? A. Yes, sir.

"Q. Where is that road with reference to the Gallardo peak? A. The old road is on the north of Gallardo and the new road is on the south, just one side of the peak.

"Q. Do you know as a matter of fact where people from Bavispe and Cuquiarachi, Batepito and Bacuachi cross the Ceniza mountains in wagons going from these places? A. At that pass of Gallardo; that is the only place.

"Q. Is there any wagon road south of the Gallardo pass except roads that are used for wood and for the distillery crossing these mountains? A. No, sir; not one.

"Q. Did you ever hear of any place there called Misa pass? A. No, sir. There is not such a thing as that, as we know; there is what is called the Agua de la Misa. That is above two miles from there south (of the Gallardo peak)."

"Cross-examination:

"Q. You say there is no road through the Perrillo or Ceniza mountains going from the Agua de la Misa? A. No such road; no, sir; no such road.

"Q. It don't cross the hills? A. No, sir; impossible.

"Q. There is no wagon road in there at this time? A. Never; no.

"Q. Do you know where this old overland road that is laid down here is located? A. Yes, sir.

"Q. Is that the road that is traveled going to San Bernardino? A. Yes, sir.

"Q. In going from Fronteras to San Bernardino, how do you go coming from the Black Water valley, and in going from Cabullona? A. You could go different ways; you could go on the San Bernardino river.

"Q. And generally that is the road that they are accustomed to go or use? A. They go through Gallardo.

"Q. And go round by the Agua Prieta valley to the old overland road that Mr. Bonillas has got on this map? A. Yes, sir.

"Q. How do you mean to say, then, that there is no means of getting through these mountains south of this Gallardo pass and between that and the Puerto de la Ceniza? A. Impossible with wagons.

"Q. You are sure of that? A. O, sure; no wagon road; never will be; no, sir.

"Q. You say you have been through this Puerto de la Misa? A. Yes, sir.

"Q. How did you go? A. On horseback.

"Q. On a trail leading through the hills? A. Yes, sir.

"Q. There is an old wagon road there? A. There never has been.

"Q. Is it not true after coming through the Gallardo pass that you cross a hill to go over into this pass just a little; there is a good road there? A. Yes, sir; wagons for posts that are for fences, but for no other purpose.

"Q. Then this wagon road that runs from Agua Prieta—that does not cut through the Perrillo mountains at all; I am talking about a wagon road that runs south of Mr. Bonillas' road; that does not cut the Perrillo or Ceniza mountains at all? A. No, sir.

"Q. You swear to that? A. Oh, yes, sure."

COLIN CAMERON testified that he had lived in the southern part of Pima (now Santa Cruz) county, immediately to the north of the line of Sonora, since 1882; that he had

traveled over Pima and Cochise counties, Arizona, and the State of Sonora, Mexico, more or less continuously since 1883.

"Q. Do you know a road going from Santa Cruz to San Bernardino? A. Yes, sir.

"Q. How does that road go and where does it pass the Ceniza mountains? A. It goes to the north of the Ceniza to a gap in that mountain.

"Q. Do you know the name of that gap? A. Yes, sir; where the wagon road goes through Gallardo.

"Q. Have you ever been through that pass; if so, how often and when? A. I have been through that many times on horseback and wagons.

"Q. How does that road going to San Bernardino lie with reference to that Gallardo peak? A. The present road goes through on the south side, the present traveled road; most of the travel, at least.

"Q. You look at that pass from the west in approaching it? A. Yes, sir.

"Q. Is there any resemblance to a saddle? A. No, sir; it is a great big peak standing up against the mountains; there is nothing there to indicate a saddle.

"Q. Did you ever hear it called Saddle or Ceniza pass? A. Never did. I don't think it ever was called that.

"Q. Do you know any pass in the Ceniza mountains or elsewhere called Misa pass? A. I do not.

"Q. Did you ever hear of any pass called the Misa pass? A. Never did.

"Q. Have you ever crossed these mountains south of the road passing by Gallardo peak? A. Horseback I have.

"Q. Any other manner? A. No, sir.

"Q. State whether or not it is possible to cross them in a vehicle? A. No place south of that wagon road until you get away down here to the river, many, many miles south.

"Q. Please look at the point designated on that map by the letter X and state whether or not it is possible to cross these mountains with a wagon entering at the point called X; if so, where the wagon must come out * * * I am speaking of going to San Bernardino? A. You could not do it at all.

"Q. Why not? A. They would go up here to this road

where they could go, and not attempt to go where they could not.

"Q. Have you ever been to the southeast of Gallardo and in the State of Sonora to the towns of Arispe and others there? A. Yes, sir.

"Q. Do you know as a matter of fact what road is taken by persons from these places and others in the same general locality to go to Bisbee? A. Yes, sir.

"Q. Where do they cross the Ceniza mountains? A. Through the Gallardo pass.

"Q. No other place? A. Not with a wagon; no other place; no, sir.

"Q. When did you say you first crossed these mountains? A. In 1886; I may have been across there in 1883, but I do not now recollect.

"Q. When were you at that place where the trail (the trail south of Gallardo pass) comes out? A. The last time I was there was in the fall of last year, September; I was bringing a bunch of cattle to see whether we could bring the cattle over or not.

"Q. What was the result? A. It was impossible to bring them over; no man would attempt to move a herd of cattle over there.

"Q. For what reason? A. The road is so rough and it would take too long; it is just a trail for horseback.

"Q. Did you or did you not know whether at the time you were first at the place marked X there was any wagon road there or wagon tracks? A. No wagon tracks, if this represents the trail; no wagon track going through; it is utterly impossible for them to go through.

"Q. Did you state whether you know, as a matter of fact, how people from Batepito go to Bisbee? A. Yes, sir; they go through the Gallardo pass.

"Q. How do the people travel going through this pass? A. They go from Santa Cruz to San Bernardino, and from San Bernardino to Lampito, and from Lampito they follow this road that is marked down here, and then go south of the Gallardo pass to San Bernardino."

On cross-examination, the witness testified that he was familiar with the topography of the country about which

he had been testifying ; that he had ranched south of it since 1888, and had passed and repassed it time and again.

"Q. People going from Fronteras or Cabullona to San Bernardino, going up the Agua Prieta valley and going across the mountains on the trail which you have just described as being two and a half or three miles south of Gallardo and comes into the road at Gallardo, would get a shorter way than going north up the valley to this overland road, would they not ? A. If there was a way to get through the mountains, they would."

The witness further testified that he had a very small interest in the Agua Prieta grant, and that as he has gone along he has looked at it and asked about it and inquired for the names from persons that have knowledge of it, and that he was entirely familiar with it.

While a good deal is said in the argument of the Government as to a road through the so-called Misa pass, it seems to be proved even by the Government witnesses that such road was merely a branch of the main road through Gallardo, and the testimony was uncontradicted that such road is not the road used by travelers now, though, if it could be used, it would effect a considerable saving. The failure of anybody to use the road would seem to be the best proof imaginable that there is no such road.

Mr. FLIPPER testified :

"Q. How far did this road (through the Misa pass) go going east ? A. It joins that road at Gallardo pass, and then on to San Bernardino."

Mr. TIPTON also testified to the same fact .

"Q. Now you have testified in your former examination as to the fact that this road going through the Puerto de la Misa joins another road going through the Gallardo pass in the vicinity of Gallardo peak. I believe you have testified to that fact. A. Yes, sir ; I have."

The Government, on the trial of this case, made elaborate efforts to prove the grant was originally located in Mexico, and we suppose that the same attempt and same arguments will be made in this court. The more the location of the monuments is discussed the clearer it is that claimants' map is correct, and we therefore refer to some positions taken by Government counsel in their elaborate brief in the lower court. The paragraphs hereinafter mentioned refer to that brief.

The Government dwelt at length on this question of where the old road was which is mentioned in the survey of 1835. Its whole case seems to depend largely on this.

Mr. Flipper so admitted, as follows:

"Q. Look at this Cochise County map. Is the road from Santa Cruz to San Bernardino on this map the same as on the Bonillas map and international boundary line? A. So far as I can tell it is the same road; I believe it to be the same road.

"Q. If the road laid down on this map is the road described in the original title papers, then that is the east center monument, and your theory is entirely wrong on the supposition? A. Yes, sir; if that is so, I am entirely wrong on that supposition.

"Q. I will show you a sketch, plat of the lands of the Messrs. Camou situate in the district of Arispe; does not that map show any road from San Bernardino to the Gallardo pass? A. It does.

"Q. And if that road correctly represents the road at the time this title was issued, your theory is entirely wrong, is it? A. Yes, sir."

The Government put the issue on this point as follows (paragraph 77*i*): "Even if in 1835 there was a trail from Santa Cruz to San Bernardino *via* Gallardo—even if the trail between these points went thus—the question still remains. Where was the 'old road' or 'old trail' mentioned in the survey of 1835?"

The title paper answers this question. It makes an explicit

statement as to where the road was. It was through the pass "to the right (or south) of which is a high hill, on which was placed a heap of stones."

Where is such a pass? All the evidence is that this is at Gallardo pass and nowhere else. We have detailed the testimony in full on this point.

The road now known as the old overland road, as it is designated on every map that was produced, is through the Gallardo pass, and it is proved that on the south side of this pass there is a high hill with a monument on it. It is therefore urged that the present road correctly represents the road referred to in the title, because each is unmistakably located with reference to the high hill south of the pass. We make this statement without any qualification whatever, because this fact is testified to by every witness, Mr. Flipper's statement being "There is a high hillock to the right of that road (the one marked on the map of the international boundary survey and the Bonillas map); it is very plain," and on the top of this hillock, according to all the testimony, including that of Mr. Flipper, there is a monument. It is not easy to imagine how there could be clearer or fuller proof as to the identity of this pass and the high hill south of it and the monument on the high hill and the road through the pass.

The Government's position is that the "old road ran through Misa pass, and the east center of the pass is thus there." The answer to this contention is that there is no proof of a high hill to the south of this pass with a monument on top of the hill. The very object, namely, the high hill, by which the pass and road are identified, is absent from the Misa pass. In connection with its discussion as to its road, the Government speaks of "matter of great probability" and urges that its theory is "entirely reasonable and probable." But the location of this road does not depend upon probability. It is described with reference to a fixed fact, the high hill south of the pass. In

the absence of all proof of such a high hill south of the Misa pass, this Misa pass must be rejected.

This is the identical argument that the Government uses at the end of its paragraph 77c, where it says: "It (the monument claimed to be the north center) is thus a monument according entirely with the *expediente* against no monument at all in the Bonillas survey and must thus be accepted by the court as the north center." Using this argument of the Government, we submit to the court that the monument on the top of the hill south of Gallardo pass is a monument according entirely with the *expediente* against no monument at all shown to exist on any high hill south of the Misa pass, and this high hill south of Gallardo must therefore be accepted by the court as the east center. If this is so, the grant is absolutely fixed by the Bonillas survey.

In paragraph 77k the Government counsel say that—

"The position of the southeast corner is uncontested. It is claimed to be and was found at Ceniza pass, and the Bonillas map shows it to be there. The Government after investigation was constrained to acquiesce in that position. The *expediente* description of the location of this southeast corner is as follows: 'At the foot of the *first* pass which is to the right of the point where the cross monument of said course ended.' The southeast corner is thus at the first pass south of the east center monument. Suppose, however, that we locate the east center where the claimants have put it, at Gallardo peak; there will be two passes between it and the southeast corner, one on the south side of Gallardo along which the wagon road to San Bernardino now runs, and another through the Misa pass, through which a wagon road also runs. But as the *expediente* says the southeast corner is at the *first* pass south of the east center monument, the Bonillas location must be rejected. * * * The truth of the matter is that Bonillas either intentionally or otherwise overlooked this pass in making his survey and was ashamed to admit it on the trial. With the positive proof of its existence now before the court, his survey crumbles and falls."

The trouble with this argument is that the evidence shows that the so-called Misa pass is only a part of the Gallardo pass, and that there is thus only one pass at Gallardo. Mr. Flipper testified that the so-called Misa pass "might be called a narrow valley instead of a pass." Mr. Tipton testified that the road going through the so-called Misa pass at its eastern end joins the road passing through Gallardo pass in the direction of San Bernardino. This was all the evidence on the part of the Government, unless we include the attempt on the part of the writer of the Government brief to have his statement in paragraph 77*j* taken as evidence. That statement is, "That such a pass exists as the Misa pass is abundantly shown by the proofs. The writer rode through it four months ago in a carriage with special agents Tipton and Flipper." The testimony in opposition as to the Misa pass was that of Bonillas, Camou, and Cameron, each of whom was far more familiar with the topography of the country than the witnesses of the Government, and in addition to the evidence of these gentlemen Mr. Slaughter, a wholly disinterested witness, whose familiarity with the country was perhaps greater than any other person who testified, swore that "Gallardo pass is three or four miles wide anyway." This evidence shows that Misa pass is simply a part of the Gallardo. Assuming this to be the case, then it is a matter of pure mathematics that the claimants' map is correct, because the first pass south of Gallardo will be the Ceniza pass and the first pass north of it the pass originally called Saddle pass, now known as College peak.

The Government further says that "if, however, the east center be located to the right of Misa pass," etc. Our constant objection to this is that no high hill with a monument on it has been proved to be south of the so-called Misa pass, and that therefore there is absolutely no ground for the Government's theory.

The argument of the Government which we have above quoted in full seems to be contradicted by the very Mexican

survey on which the Government chiefly relied. We refer to the one dated "Marzo, 8, '99," with the seal "Juzgado de Distrito de Sonora. Guaymas." This map lays down the east side of this grant as the "Sierra del Perrillo." The northeast corner of this map is worded "Cerro Gallardo, en el Puerto de la Silla." According to the Government's theory, the Misa pass lies between the Gallardo pass and the southeast corner, but this map not only makes no reference to any Misa pass, but designates the southeast corner as "en el Primer Puerto," "in the first pass." According to this map, the first pass south of Gallardo is at the southeast corner, just as the claimants have contended.

When the Government says (par. 77*q*) that "the same survey (the modern Mexican survey) fixes the northeast corner at Gallardo, just as contended by the United States," it seems to misapprehend the whole case. The title paper nowhere says that Gallardo is in the Saddle pass. Gallardo cannot be the northeast corner, because that corner is identified by the title paper as the pass to the right of which is the "small" hill near two larger ones, and Gallardo and the hill northwest of it are "high" hills. The pass to the right of which is the "high" hill is the pass where the east center monument is located, and thus the location of Gallardo unmistakably fixes the east center monument. Whatever mistakes may have been made in the names of these passes, as they are called at the present day, and whatever surveys may be made by Mexican officials, and whatever theories may be advanced by the Government, the calls of the expediente will remain too clear to be confused. The northeast pass is identified by the "small" hill to the south. The east center pass is identified by the "high" hill to the south. This "high" hill is at Gallardo. Therefore the later Mexican survey in locating Gallardo on or near the international boundary line proves that the east center monument is there, and this disposes of the case so far as the location of the grant on the earth's surface is concerned.

Mr. Flipper's belief as to this grant was stated by him as follows:

"I believe the loma identified by Mr. Rosas as the north center monument is where the original north center monument was; I believe that the Puerto de Gallardo is what was known at that time as the Puerto de la Silla. I believe that the Cerrito Pequeñita was the northwest corner. These three lines fix the north line of the grant," and according to this theory the grant would be in Mexico.

As to two of these monuments we have shown how, in our opinion, they fail to conform to the calls of the title. Mr. Rosas' north center monument is the one identified by Mr. Oury as having been built to help locate the international boundary line. The Puerto de Gallardo absolutely fails to conform to the northeast call of "a small hill that is to the right (or south) of the pass and near two larger ones." Moreover, each of these monuments as taken by Mr. Rosas is out of all proportion to the shape of the grant, as heretofore shown.

The northwest corner monument was identified by Mr. Bonillas as follows:

"Standing at the northeast corner monument above described, and looking towards the west in a direction at right angles to the course of the valley, two or three small hills can be seen near the foot of the Mule mountains. I followed the course of the valley, which is twenty miles wide at this point, finding the northwest corner monument upon one of them. These little hills are formed entirely of limestone, rising in the plain about a mile from the foot of the Mule mountains, there being no others to the north, and for a considerable distance to the south."

As to this northwest corner, Mr. Flipper testified as follows:

"I know there is a small hill in that vicinity (referring to the point designated on the Bonillas map as the northwest corner), but as to the monument I do not know."

As to the northeast corner, Mr. Flipper testified thus:

"Q. Do you know what is known as, what has been testified to as, College peak by Mr. Bonillas and his map filed by him and his testimony taken at the last session of this court?"
A. Yes, sir."

We deem it not amiss again to ask the court to notice the fact that the Government witnesses refrained from going to either the northeast or northwest corner as taken by the claimants, though a month before the trial they had been specifically informed by the testimony and map of Bonillas where these points were claimed to be, and that, as testified to by Bonillas, they answered in every minute respect the calls of the expediente. Why, we ask, did the Government witnesses not go to these monuments? Government counsel state, as heretofore quoted, that "the position of the southeast corner is uncontroverted. It is claimed to be and was found at Ceniza pass, and the Bonillas map shows it to be there. The Government after investigation was constrained to acquiesce in that position." It seems a pity that the Government did not also investigate as to the northwest and especially as to the northeast corner as shown on the Bonillas map. It might have been that after investigation the Government would have been constrained to acquiesce in the position of those monuments also, in which case there probably would have been no need for arguments based on probability or conjecture. If Mr. Flipper had gone to the northwest monument, he could have testified whether or not the small hill which he admits to be in that vicinity had on it a monument as testified by Mr. Bonillas. If so, it would have corroborated Mr. Bonillas, and if not, it would have raised a direct question as to the identity of this northwest monument. So, if Mr. Flipper had gone to the pass taken by claimants as the northeast corner and had testified that there was a small hill to the right of that pass and near two larger ones, this also would have been corroborative, or if

he had testified that at that pass there was no small hill to the right and near two larger ones, this would have been evidence directly tending to impeach the accuracy of the Bonillas survey as to the northeast corner. In either event the evidence would have borne directly on the most important questions before the court.

Whether the Government was unwilling to investigate the northeast monument for fear that it would be constrained affirmatively to acquiesce in the location given it by claimants we do not know, but the fact is that the Government did not offer any evidence whatever tending to contradict Mr. Bonillas' testimony that the monument taken by him answers the call of the expediente in every particular. It seems to us, as we have heretofore submitted, that in deciding according to the weight of the evidence, the court will be constrained to accept Mr. Bonillas' location of this monument, because there was no evidence *contra* on this point, and the witness was not impeached.

NORTH CENTER MONUMENT.

As heretofore stated, this monument is not at any conspicuous point in the topography of the valley, but was located with reference to the Silla pass, the northeast corner. The description as to the north center is as follows:

"Returning to the center, the direction of the north was taken, and going up the valley there were measured 100 cords which ended on a very small hill, fronting towards the east with the pass called La Silla, having ordered a heap of stones to be placed there and a cross as a monument."

The testimony shows that going up the valley a distance of 2.96 miles from the center there is at a point $\frac{54}{100}$ of a mile south of the international boundary line a small monument of stones, and it is argued by the Government that this is the north center monument. No witness testified as to it,

and Mr. Flipper positively refrained from committing himself to it. As to this monument he testified (pp. 52, 53):

"A. I testified that I did not pretend to identify that as the original monument. It is very possible it is the original monument.

"Q. And you believe that is the place? A. Yes sir.

"Q. Will you state why you believe that is the place? A. Because it agrees with the description in the original title papers.

"Q. Then your assumption or theory is based on the supposition that the point described by Mr. Bonillas as the east center monument is in fact the northeast monument? A. That is my theory.

"Q. And if it is true, as a matter of fact, that the northeast monument of this grant as originally surveyed is what is termed the Silla pass, the northeast corner as laid down on Bonillas' map, you would of course, have a different theory? A. If that is true, why certainly.

"Q. If the old road from Santa Cruz to San Bernardino is correctly represented on this international boundary map, is it not true, in your opinion, that the monument on the loma south of that is the east center monument of this grant? A. If this is the old road referred to in the old title paper, then that would be true."

We have proved, it seems to us, that Mr. Flipper's theory is incorrect, and that the northeast corner monument is correctly designated by Mr. Bonillas as the others were.

This pile of stones which the Government sought to take as the north center monument was proved to be an entirely different one.

Mr. Oury's notes dated October 1, 1892, as to this monument are as follows:

"Returning to the center at Agua Prieta, I traveled up the valley carefully searching over every hill for a monument of stones or the remains of one. At a point about three and one-half miles distant, on the top of a small hill, I found a mound of rock, well built and still standing, which was evidently quite recently erected, and which my guide informed me he had helped to build there as marking the in-

ternational boundary line between the United States and Mexico. Its location, as I subsequently determined, from my survey, is very nearly on this line."

The point taken by the Government as the north center monument is located with respect to the international boundary line (testimony of Mr. Flipper) as follows: "It lies to the south of the international boundary line fifty-four-hundredths of a mile."

We submit the foregoing as affirmative proof coming through Mr. Oury from the very man who had helped build the monument, which is, in fact, very nearly on the international boundary line and would serve the purpose of marking that line, as was its purpose according to the above statement.

But in addition to what we have heretofore said, the attempt of the Government to place the northern monuments south of the international boundary line give the grant a shape so unusual and improbable, in view of all the facts, that the theory seems untenable, not to say laughable. We invite the attention of the court to this feature as shown by the description of the expediente.

From the center to the south center is stated to be 59 cords, and from the center to the north center 100 cords—approximately twice as far. From the southeast to the east center is 59 cords, and from the east center to the northeast 100 cords—approximately twice as far. The grant should, therefore, present an appearance where the north center is approximately twice as far from the center as the south center is.

The center of this grant is fixed beyond doubt, and the south center as taken by Bonillas is conceded to be absolutely correct. From the center to the south center, stated to be 59 cords, is 32,470 feet, or a little over 6 miles. According to the same proportion, from the center monument to the north center should be a very little less than 10 miles.

From the east center, as taken by the Government, to the southeast is from 5 to 6 miles. According to the same proportion, from the east center to the northeast should be just a trifle short of 10 miles.

The point which the Government is urging as the north center is, however, as shown by the testimony of Flipper, only 2.96 miles from the center, and the northeast monument, as claimed by the Government, is estimated to be only 2 or $2\frac{1}{2}$ miles from the east center monument. According to Mr. Flipper, it is "approximately between 2 and $2\frac{1}{2}$ miles."

The title paper and evidence show that the valley both north and south of the center monument is not broken, but almost level, and thus capable of accurate surveying (see paragraph 77e of the Government's brief), and that the distance from the center to the south center was measured and counted, and the distance from the center to the north center was also measured and counted.

According to the Government's theory, 59 cords measured south are over 6 miles, while 100 cords measured north are less than 3 miles. The 59 cords measured south are twice as far as the 100 cords measured north.

We submit that this is so far improbable that it should be rejected. It is not to be believed that the same men measuring and counting at the same time would make such a preposterous discrepancy. The errors in measuring were errors making the distances longer than they were in fact. No case has come before this court where the distances as stated are shown to be shorter than they really are.

The place taken by claimants as the northeast corner exactly answers the call of the expediente, as will be shown when we refer to the evidence. In addition to this, its location is in proportion to the calls set out in the paper. As shown by the Bonillas map, it is twice as far to the north of the east center monument as the southeast corner is to the south of that monument.

The theory of the Government is that the northeast corner was placed at a point only a third as far to the north of the east center as the southeast corner is to the south, though the title states that the southeast corner is 59 cords south, and the northeast corner is 100 cords north.

The Government will doubtless at once concede the force of this argument, in view of the fact that it has adopted in its brief before the lower court the identical line of reasoning (see paragraph 74g). Counsel there argue that measurements "should, allowing for slight discrepancies, be the same, or approximately the same," and call attention to a "difference of over six miles in the same measurement run by the same surveyor at the same time," and argue that the monument which was then under discussion should not be taken at a place which is not in proportion to the measurements.

The facts in the case which the Government was then discussing seem a sufficient answer to the discrepancy therein, but the argument itself is a perfectly legitimate one, and we adopt it as fully as the Government did. If it is applied to the facts in this Agua Prieta case, it would seem at once to show that the Government's theory is untenable. The Government is asking this court to adopt a theory which assumes that the same surveyor at the same time would say that 59 cords to the south amounted to over six miles, while 100 cords to the north, in the same level valley, amounted to less than three miles.

In all the literature of the land-grant subject, this theory in the Agua Prieta case seems to be the strangest. Errors in measuring and calculating were certainly made, but there has never yet been any suggestion that in a level country the surveyor would with the same measure make 100 cords less than half the distance of 59 cords.

A reasonable theory is, to use the language of the Government, that the measurements "should, allowing for slight discrepancies, be the same or approximately the same." The measurement from the center to the south

center was the first one made. These 59 cords are, as a matter of fact, as heretofore stated, over six miles. Taking this as a standard, and making the measurement to the north to correspond proportionately, the north center should be almost 10 miles from the center, and this is very nearly the distance from the center on the line in the Bonillas map which joins the northeast and northwest corners.

The same reasoning applied to the northeast corner with reference to the east center will show that the place taken by the claimants is in proportion to the measurement from the east center to the southeast. On the other hand, to take the place which the Government assumes as the northeast makes the grant incomprehensible on any theory which will accord with the experience derived from former grants. The northeast corner will be only 2 or $2\frac{1}{2}$ miles from the east center, while the southeast is five or six miles from the same place, and this in a grant where the southeast is said to be 59 cords from the east center and the northeast 100 cords from the same place.

VII.

The lower court further says:

"The Mexican government in construing the grant in this case held it to be a sale by quantity, and the evidence shows that in a proceeding to denounce the demasias, the cabida legal, $6\frac{1}{2}$ sitios were laid off by the survey to the owners and the demasias sold and patented. It is true these proceedings were subsequent to the treaty and not binding on this court, but it is quite persuasive and shows the construction put by the officials of Mexico on the law in force at the date of the sale in this case."

As said by this court in *U. S. vs. Yorba*, 1 Wall., 412, 423:

"No proceedings in Mexico subsequent to the treaty can affect rights in the United States at the date of the treaty. The rights asserted by the inhabitants of the ceded territory depend upon the concession made by the officers of the

government having at the time the requisite authority to alienate the public domain, and not upon any subsequent declarations or actions of Mexican officials."

If the construction of this title paper were doubtful, the action of the Mexican authorities might be entitled to consideration, but we submit that there is no room for doubt as to the intention of the parties. We are trying this case before the Supreme Court of the United States, not before Mexican officials, and this court must put its own construction on the papers. The construction put upon the instrument by the Mexican officers at the time of the issuance of the grant is, as we have submitted, entitled to great weight, because this contemporaneous construction must outweigh any construction arrived at years after the treaty.

The fact is that the Mexican authorities in their resurvey of this grant wholly misunderstood or misstate the calls of the title paper. On page 217 of the record herein the Mexican surveyor states from the point assumed as the north center monument of this Agua Prieta grant the northeast corner monument was found by "measuring 13,010 meters to the summit of Gallardo hill (cerro) in Saddle pass, which the titles call for."

But the titles do not call for a high hill in Saddle pass. They call for a very small hill in that pass as the northeast corner and for a high hill in the east center pass. This call of the Mexican surveyor is the call for the east center monument, and in taking it as the northeast corner he makes a palpable and fatal mistake. Saddle pass with the very small hill to the south of it is many miles north of the boundary line, as shown by the Bonillas survey and by all the testimony, while the Gallardo hill or cerro marks the east center monument.

The later Mexican proceedings cannot change the calls of the title or the topography of the country, and it needs no elaboration to show that this subsequent attempt of the Mexican authorities to locate the grant is wrong in toto.

The Mexican proceedings were discussed at some length by the Government in the argument of this case, and in the Government's brief filed in the lower court is quoted the following from a letter of Camou of July 15, 1880:

"Finally there was no land in American territory, as we believe."

As to this the Government counsel say:

"This admission by claimant Camou's predecessor in title is binding on him, and not only have the owners of this property thus declared that none of it is in the United States, but that this is the status of the property has been agreed upon by the government of Mexico and the owners in a proceeding for the denunciation of the *demasias*." * * * "The acceptance of this survey (the Mexican survey of 1880) and this patent without objection but with every evidence of acquiescence and approval, forever estops the Camous or those deraigning under him to assert that that survey is wrong."

It is hard to believe that this argument is expected to be taken seriously. Could Camou and the government of Mexico bind the United States in any way in that proceeding? If the Mexican government had by survey declared that the whole of the grant was in the United States, would our Government have been estopped to deny such a survey? Can the Mexican government by any proceeding whatever give to its decrees any extraterritorial effect? If part of this grant was, as a matter of fact, located in the United States at the time of the treaty, can the government of Mexico, years afterward, in any way affect the part in our country? If, as claimed by the Government, the Mexican proceedings are *in rem*, is not the jurisdiction in Mexico limited to such part of the *res* as is located in her territory? If the proceedings are, as claimed by the Government, *res judicata* in an action *in personam*, is not the adjudication confined to the land in Mexico? Certainly these questions answer themselves. As

against the Mexican government, Camou may be estopped to deny that the survey was wrong, but whether he is or not is perfectly immaterial to this proceeding. The government of Mexico has as much to do with the part of the grant which is in the United States as this court would have with the part which is in Mexico.

The record in *Camou vs. U. S.* shows that parties in interest, as early as 1862, claimed that these lands were "a part within the American lines (p. 113)." On page 125 the statement is made, "a large portion of which (lands) are situated in Arizona, United States of America." The heading given on page 124 (all in the record in the Camou case) is "In reference to the lands of San Pedro, Territory of Arizona." On page 129, referring to this very Agua Prieta grant, the statement is "The largest portions of which lands are situated in Arizona Territory of the United States."

As to these Mexican proceedings, it seems an elementary principle that Mexico may do quite as she pleases with lands in her own country, but that no such proceedings can in anywise affect rights in the United States which were vested at the time of the treaty. Whether there were such rights depends on the state of affairs existing at the treaty, and not on admissions claimed to have been made years afterwards. We have adduced the evidence proving, as we think, perhaps as clearly as any survey which has come before this court, that the tract of land as originally surveyed is located in part in the United States, and is correctly designated by the Bonillas survey. The legal rights of claimants are, as we submit, secured by the fact that this was a grant of the whole of a tract by name. In addition to this, we have made a tender by virtue of which we are entitled to the *demasias*, if the court should be of the opinion that there are any *demasias* in the grant.

One point still remains: the argument of the Government that claimants have no title sufficient to invoke the jurisdic-

tion of this court. The copy of the deed of sale from the various parties Elias to Camou in nowise conformed to the laws of the situs of that part of the property which is in the United States, and it was impossible for the Camous by such instrument to acquire title which would be valid under the American law. The various deeds were drawn up in the Mexican form, and while they might be good to convey title to the part in Mexico, they are of no effect, as we submit, as to the part in the United States. The devolution of title to land is governed by the law of the country where the land is situated, and parties in Mexico might in the best of faith attempt to deed land in Arizona, by means of a deed conforming to the laws of Mexico, and yet wholly fail of their object because such deed did not comply with the law of the situs.

For authorities on the point that the title and disposition of real property is subject exclusively to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another, the court is referred to *McCormick vs. Sullivan*, 10 Wheat., 193; *Kerr vs. Moon*, 9 Wheat., 571; *Bryan vs. Insurance Co.*, 6 Otto, 627.

The so-called deed of sale did not comply with the statutes of Arizona. (See Howell's Code of Arizona, 1864, p. 275; Compiled Laws of Arizona, 1877, p. 380.)

This court under the act creating it will not attempt to pass on the rights between the Elias and Camou. If it were of opinion that the title is in Camou, every objection of the Government on this point seems to be met by the fact that Eduardo Camou was made a coplaintiff. What the Government has in mind in criticising the fact that the deed under which he claims is a quitclaim deed is not apparent to us. It is generally thought that a quitclaim deed will convey an existing title just as fully as any other instrument known to the law. If Eduardo Camou is willing to

take a quitclaim deed, it does not lie with the United States Government to complain.

It is submitted that this case should be reversed and a decree be entered confirming this grant according to the Bonillas survey.

Respectfully submitted.

ROCHESTER FORD,
Attorney for Claimants.